TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 51

JOHN W. GLEASON, DOING BUSINESS AS JOHN W. GLEASON COTTON COMPANY, PETITIONER,

vs.

SEABOARD AIR LINE RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 22, 1926

CERTIORARI GRANTED MARCH 1, 1926

(33,167)

28 §2

Powers.

MCT. 49 § 102 § 22 act-Aug 29. 1916 - 39 Stat 622

makes any banker or bill of lading issued by any agt having authority to receive goods a common carrier - (b) liable for order bill - who has given value in good faith relying on the description of the goods =

Clear that Stand on second count - alone -

Not in. false representation. Bill of lading authorized to receive for a vessel. The b/l was a forgery - & Plaintiff can recover only against one of D.

(33,167)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 28, 1928

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ORIGINAL PETITION.

Georgia,
Chatham County.

To the City Court of Savannah.

The petition of John W. Gleason doing business as John W. Gleason Cotton Company, hereinafter called the plaintiff, respectfully shows:

First Count.

1. That the Seaboard Air Line Railway Company, hereinafter called the defendant, is a corporation having an office, agent and place of business in the County and State aforesaid.

2. That the Seaboard Air Line Railway is a common carrier, engaged in the business of transporting goods for hire.

3. That on March 18th, 1925, J. A. Tillman delivered to the said Railway Company at Charleston, South Carolina, one hundred and ten (110) bales of cotton marked "JAT" to be transported by the said defendant to Savannah, Georgia.

4. That the said defendant issued its bill of lading dated March 18th, 1925, for this cotton and agreed to deliver the same to the order of said J. A. Tillman at Savannah, Georgia, and to notify John W. Gleason Cotton Company of the arrival of the said cotton.

5. That the said J. A. Tillman indorsed the said bill of lading and attached it to a draft for Ten Thousand ($10,000.00) Dollars drawn upon this plaintiff, which was presented by the Citizens and Southern Bank of Savannah to this plaintiff.

6. When said draft and bill of lading were presented to this plaintiff, this plaintiff by reason of the facts hereinafter alleged in paragraphs 9 and 10 of this petition, and relying upon the said facts, paid the said drafts and obtained the said bill of lading.

7. Cotton shipments into Savannah are generally made on order of notify bills of lading, which are indorsed and attached to the drafts. The purchasers of the drafts and bills of lading can not afford and will not pay the drafts until informed by the railroads that the cotton has arrived.

2 8. The defendant, in order that it might compete with other railways hauling cotton into Savannah, as well as to comply with the duty imposed upon it of informing the party to be notified under the bill of lading of the arrival of the cotton, employed one MacDonnell, as its Agent, at its office in Savannah, Georgia, for the purpose of notifying the cotton trade when cotton covered by bills of lading had arrived, of accepting a surrender of the said bills of lading and issuing receipts for all bills of ladings so surrendered.

9. That the defendant is estopped to deny the matters set forth in the 1, 2, 3, 4 and 5 paragraphs of this petition by reasons of the following facts:

(a) On the morning of March 19, 1925, the said MacDonnell acting within the scope of his authority as agent for the defendant and while at the defendant's offices, telephoned this petitioner and notified him of the arrival of one hundred and ten (110) bales of cotton marked "J. A. T." from Charleston, South Carolina, consigned to J. A. Tillman or order, notify this plaintiff, and requested this plaintiff to let the defendant have the bill of lading. Said telephone conversation was the usual and customary method of informing parties to be notified under bills of lading of the arrival of goods.

(b) That because of this representation, this plaintiff purchased the said bill of Lading, as set forth in the 6th paragraph of this petition, and, on the same day presented it to the said defendant by handing the same to its agent, MacDonnell, who, on March 19th, 1925, issued the defendant's receipt for the same; copy of the said receipt being hereunto attached and marked "Exhibit A." And the said defendant promised to deliver the said cotton at the warehouse of this plaintiff.

10. The said Ten Thousand ($10,000.00) Dollars was transmitted to Charleston, where it was paid to Tillman March 20, 1925.

11. That the said defendant failed and refused to deliver said cotton to this plaintiff. The value of said cotton at Savannah, Georgia, on March 19, 1925,
3 was Twelve Thousand, Five Hundred ($12,500.00) Dollars.

By reason of the foregoing matters, the defendant has endamaged plaintiff in the sum of Twelve Thousand,

Five Hundred ($12,500.00) Dollars for which plaintiff prays judgment and that process may issue requiring said defendant to be and appear at the next term of this Honorable Court.

Second Count.

1. That the Seaboard Air Line Railway Company, hereinafter called the defendant, is a Corporation having an office, agent and place of business in the County and State aforesaid.

2. That the Seaboard Air Line Railway Company is a common carrier engaged in the business of transporting goods for hire.

3. That a large and important part of the defendant's business is the transportation of cotton.

4. Cotton shipments into Savannah are generally made on order notify bills of lading, which are indorsed and attached to drafts. The purchaser of drafts and bills of ladings cannot afford and will not pay the drafts until informed by the railroads that the cotton has arrived.

5. The defendant, in order that it might compete with other railways hauling cotton into Savannah, as well as to comply with the duties imposed upon it of informing the party to be notified under the bill of lading of the arrival of the cotton, employed one MacDonnell, as its Agent, at its offices, in Savannah, Georgia, for the purpose of notifying the cotton trade when cotton covered by bills of lading had arrived, of accepting a surrender of the said bills of ladings and issuing receipts therefor

6. That on the morning of March 19, 1925, the said MacDonnell, acting within the scope of his authority as agent for the defendant, and while at the defendant's offices, telephoned this petitioner and informed him that one hundred and ten (110) bales of cotton
4 marked "J. A. T." had arrived from Charleston, South Carolina, consigned to J. A. Tillman or order notify this plaintiff, and requested this plaintiff to let defendant have the bill of lading. Said telephone conversation was the usual and customary method of informing parties to be notified under bills of lading of the arrival of goods.

7. That thereafter, on the same day, the Citizens and Southern Bank of Savannah presented to your petitioner a draft dated Charleston, S. C., March 18, 1925, drawn upon him for the sum of Ten Thousand Dollars ($10,000.00) and payable to the order of the said J. A. Tillman. The said draft was properly indorsed by the said J. A. Tillman and had attached thereto a bill of lading issued by the defendant, in which the defendant agreed to transport from Charleston, South Carolina, and deliver to the said J. A. Tillman or order, at Savannah, Georgia, one hundred and ten (110) bales of cotton marked "J. A. T." and to notify this plaintiff of the arrival of the said cotton. The said bill of lading was indorsed by the said J. A. Tillman.

8. That relying upon the representations made by defendant through its said agent, as set forth in 6th paragraph of this petition, this plaintiff purchased the said draft and said bill of lading for the sum of Ten Thousand ($10,000.00) Dollars, and thereafter, on the said 19th day of March, 1925, presented the said

bill of lading to the said defendant by handing it to its duly authorized agent, the said MacDonnell, who gave the defendant's receipt for same.

9 That the said bill of lading was a forgery and no cotton moved under it or arrived in Savannah or was ever delivered to plaintiff.

10 Plaintiff further shows that the false and fraudulent statements made by the said defendant, as set forth in the 7th paragraph of this petition has, by the reason of the foregoing facts, endamaged your petitioner in the sum of Twelve Thousand, Five Hundred ($12,500.00) Dollars for which he prays judgment.

5 Third Count.

1 That the Seaboard Air Line Railway Company, hereinafter called the defendant, is a corporation having an office, agent and place of business in the County and State aforesaid.

2 That the said Seaboard Air Line Railway Company is a common carrier, engaged in the business of transporting goods for hire.

3 That a large and important part of the defendant's business is the transporting of cotton.

4 Cotton shipments into Savannah are generally made on order notify bills of lading, which are indorsed and attached to drafts. The purchasers of drafts and bills of lading can not afford and will not pay the drafts until informed by the railroads that the cotton has arrived.

5. The defendant, in order that it might compete with other railways hauling cotton into Savannah, as well as to comply with the duties imposed upon it of informing the party to be notified under the bill of lading of the arrival of the cotton employed one MacDonnell, as its agent, as its offices in Savannah, Georgia for the purpose of notifying the cotton trade when cotton covered by bills of lading had arrived, of accepting a surrender of the said bills of lading and issuing receipts therefor.

6. That prior to March 19th, 1925, the said MacDonnell has become corrupt and hishonest and has stolen numerous bales of cotton from the said defendant and forged bills of lading all of which was on said date, known to the defendant. That the defendant, notwithstanding said knowledge, continued to employ the said MacDonnell as its agent as aforesaid.

7. That the plaintiff was on March 19th, 1925, and a long time prior thereto a regular customer of defendant.

8. That on the morning of March 19, 1925, the said MacDonnell, acting within the scope of his authority as agent for the defendant, and while at the defendant's offices, telephoned this petitioner and informed him that one hundred and ten (110) bales of cotton marked "JAT" had arrived from Charleston, South Caro-
6 lina, consigned to J. A. Tillman or order, notify this plaintiff, and requested this plaintiff to let the defendant have the bill of lading. Said telephone conversation was the usual and customary method of informing parties to be notified under bills of lading of the arrival of goods.

9. That thereafter, on the same day, the Citizens and Southern Bank of Savannah presented to your petitioner a draft dated Charleston, S. C., March 18, 1925, drawn upon him for the sum of Ten Thousand ($10,000.00) Dollars and payable to the order of the said J. A. Tillman. The said draft was properly indorsed by the said J. A. Tillman and had attached thereto a bill of lading issued by the defendant, in which defendant agreed to transport from Charleston, South Carolina, and deliver to the said J. A. Tillman or order, at Savannah, Georgia, one hundred and ten (110) bales of cotton marked "J. A. T." and to notify this plaintiff of the arrival of said cotton. The said bill of lading was indorsed by the said J. A. Tillman.

10. That relying upon the representations made by the defendant through its said agent, as set forth in the 6th paragraph of this petition, this plaintiff purchased the said draft and said bill of lading for the sum of Ten Thousand ($10,000.00) Dollars, and thereafter, on the said 19th day of March, 1925, presented the said bill of lading to the said defendant by handing it to its duly authorized agent, the said MacDonnell, who gave the defendant's receipt for the same.

11. That said bill of lading was a forgery and no cotton moved under it or arrived in Savannah or was ever delivered to plaintiff.

12. The defendant was negligent in the following particulars:

(a) In negligently representing that the said cotton had arrived in Savannah.

(b) In negligently continuing in its employment the said MacDonnell, after knowledge that he was dishonest and corrupt and in thereafter holding him out to the cotton trade as the person authorized to in-
7 form it of the arrival of cotton.

13. That the said negligence endamaged the plaintiff in the sum of Twelve Thousand Five Hundred (812,500.00) Dollars by reason of the foregoing facts for which sum this plaintiff prays judgment.

Plaintiff prays that process may issue requiring the defendant to be and appear at the next term of this Honorable Court to answer petitioner on the merits of the foregoing complaint.

HARTRIDGE, WRIGHT & BRENNAN,
Plaintiff's Attorneys.

8 the person authorized to inform it of the arrival of cotton.

13. That the said negligence endamaged the plaintiff in the sum of Twelve Thousand, Five Hundred (812,500.00) Dollars by reason of the foregoing facts for which sum this plaintiff prays judgment.

Plaintiff prays that process may issue requiring the defendant to be and appear at the next term of this Honorable Court to answer petitioner on the merits of the foregoing complaint.

HARTRIDGE, WRIGHT & BRENNAN,
Plaintiff's Attorneys.

Indorsement: Common Law No. 1595. Plaintiff's Petition. Filed in office, November 7th, 1925. Margaret Clarke, Deputy Clerk.

9 EXHIBIT "A".

Savannah, Ga., 3 19 25.

Received from John W. Gleason Cotton Company the following Bills of Lading Issued by Seaboard Air Line Ry.

Date—3 18 25.
Shipper—J. A. Tillman.
Issued at—Charleston, S. C.
Mark JAT.
No. Ba C—110.
No.—

SEABOARD AIR LINE RAILWAY.

Received Mar. 18, 1925, Cotton Desk, Savannah, Ga. MacD.

10 State of Georgia,
County of Chatham,
City of Savannah.

John W. Gleason, doing business as John W. Gleason Cotton Company,

vs.

Seaboard Air Line Railway Company.

To the Sheriff of the City Court of Savannah, Greeting:

The defendant Seaboard Air Line Railway Company is hereby required, personally, or by its Attorney, to be and

appear at the next City Court of Savannah, on the first Monday, being the Second day of November, next, then and there to answer the plaintiff on the merits of the foregoing petition; as in default of such appearance the said Court will proceed as to justice will appertain.

Witness, the Honorable Davis Freeman, Judge of said City Court, this 19th day of October in the year of our Lord, One Thousand Nine Hundred and Twenty-five

HARTRIDGE, WRIGHT & BRENNAN,

(City Court Seal) Plaintiff's Attorney.

THOMAS S. RUSSELL,
Dept. Clerk City Court, Savannah.

10½ Sheriff's Office, City Court, Savannah, Ga., 10 20 25.

I have this day served the within petition and process upon the defendant Corporation Seaboard Air Line Railway Company by leaving a copy thereof at the office of the Superintendent, that being the usual and customary place of transacting the ordinary public business in Chatham County, Georgia.

The return of—

A. B. CONNOR,
Deputy Sheriff, C. C. S.

In the City Court of Savannah, November Term, 1925. John W. Gleason doing business as John W. Gleason Cotton Co., vs. Seaboard Air Line Railway Co. Filed in office this 19th day October, 1925. Thomas S. Russell, Deputy Clerk, C. C. S. Hartridge, Wright & Brennan, Plaintiff's Attorney, Savannah, Ga.

11 NOTICE OF REMOVAL.

In the City Court of Savannah, Chatham County, Georgia.
November Term, 1925.

John W. Gleason, doing business as John W. Gleason Cotton Company,

vs.

Seaboard Air Line Railway.

Savannah, Georgia, October 31, 1925.

To Messrs. Hartridge, Wright and Brennan, Attorneys for Plaintiff.

Notice is hereby given that the Seaboard Air Line Railway Company, the defendant in the above entitled cause, will on the 31 day of October, 1925, file in the City Court of Savannah, Chatham County, Georgia in which said suit is now pending its petition and bond, copies of which are hereto annexed, for the removal of the said cause from the City Court to the District Court of the United States in and for the Eastern Division of the Southern District of Georgia.

CONNERAT & HUNTER,
Attorneys for Defendant.

SERVICE OF REMOVAL NOTICE.

Service of the foregoing notice is hereby acknowledged, copy of said notice and of said petition for removal and bond received; and all further and other notice and service waived.

This 31 day of October, 1925.

HARTRIDGE, WRIGHT AND BRENNAN,
Attorneys for Plaintiff.

12 PETITION FOR REMOVAL.

In the City Court of Savannah, Chatham County, Georgia, November Term, 1925.

John W. Gleason, doing business as John W. Gleason Cotton Company,

vs.

Seaboard Air Line Railway Company.

To the City Court of Savannah, Chatham County, Georgia:

Now comes the Seaboard Air Line Railway Company, the defendant in the above entitled cause and files this its petition for the removal of this case from this Honorable Court in which it is now pending, to the District Court of the United States in and for the Eastern Division of the Southern District of Georgia, your petitioner respectfully showing:

One.

That the above suit was filed in this Honorable Court on the 19th day of October 1925; and that process attached to the petition in said suit required your petitioner as Defendant to be and appear at the November Term 1925, of this Court to be held on the 1st Monday in November, being the 2nd day of November 1925, then and there to answer the plaintiff on the merits of said petition; and that time to plead, answer or demur to the same has not expired under the laws of this State in such cases made and provided.

Two.

That the said suit is one of a civil nature at common law of which the District Courts of the United States

have original jurisdiction, being a controversy wholly between citizens of different states, as is hereinafter more fully set forth; and that the matter in dispute exceeds the sum of Three Thousand ($3000.00) Dollars exclusive of interest and costs in that said suit prays for judgment against Defendant in the sum of Twelve Thousand Five Hundred Dollars ($12,500.00).

13 Three.

At the time of the commencement of said suit and since that time the Plaintiff therein was and is now a citizen and resident of the State of Georgia and the Defendant therein, your petitioner, herein asking this removal, is a foreign corporation non-resident in said State of Georgia and was at the time of the commencement of this suit and since that time and still is a corporation chartered and existing under the laws of the States of Virginia, North Carolina, and South Carolina, having its principal office in the City of Petersburg, in the State of Virginia.

Four

Your petitioner presents and files herewith a good and sufficient bond in the sum of Two Hundred Fifty Dollars ($250) conditioned as the law directs that it will within Thirty (30) days from the filing of this petition for removal enter and file a certified copy of the record of this case in the District Court of the United States for the Eastern Division of the Southern District of Georgia and further conditioned for the payment of all costs which may be awarded by said Court if the said District Court shall determine that this suit was improperly and wrongfully removed thereto.

Five

No previous or other application for the removal of this cause has been made nor has any appearance, pleading or answer been made or filed by or in behalf of Defendant in said case, who is petitioner herein and petitioner appears now specially and solely for the single purpose of presenting this petition for procuring a removal of said cause as aforesaid; and petitioner expressly reserves all its rights to make and file all pleas, answer and defenses of every kind to the suit which petitioner as defendant has been summoned to answer as aforesaid.

Wherefore, petitioner prays that the bond herewith presented may be accepted and that this Honorable Court proceed no further in the said suit except to order that the same be removed into said District Court of
14 the United States and to direct that a transcript of the record be made and certified and removed into the said District Court of the United States pursuant to the laws of the United States in such cases made and provided; and that such other and further relief may be granted to your petitioner as may be proper in the premises. This 31st day of October, 1925.

SEABOARD AIR LINE
RAILWAY COMPANY.
By S. M. DUTTON,
Sup't. (Corp. Seal)

CONNERAT & HUNTER,
Attorneys for petitioner.

Georgia,
Chatham County.

Personally before me appeared S. M. Dutton, who being duly sworn deposes and says that he is Sup't. at Savannah, Georgia, of the Seaboard Air Line Railway Company, a corporation created by and organized and existing under the laws of the States of Virginia, North Carolina and South Carolina and having its principal office in the City of Petersburg in the State of Virginia; and deponent says that he is the duly authorized agent of said corporation and that the facts therein set out are true.

S. M. DUTTON.

Sworn to and subscribed before me at Savannah, Chatham County, Georgia, this 31st day of October, 1925.

GEORGE P. BROWN,
Notary Public.

15 REMOVAL BOND

In the City Court of Chatham County, Georgia,
November Term, 1925.

State of Georgia,
Chatham County.

John W. Gleason trading as John W. Gleason Cotton Company,

vs

Seaboard Air Line Railway Company.

Know all men by these presents that we, the Seaboard Air Line Railway Company, a corporation created and existing under the laws of the States of Virginia, North

Carolina, and South Carolina, having its principal office in the City of Petersburg, in the State of Virginia; as principal, and a Independence Indemnity Company, a Corporation of Pennsylvania and a corporation duly qualified by law to do business as a surety company in the State of Georgia, as surety, are held and firmly bound unto John W. Gleason, the plaintiff in the above stated cause, his successors and assigns in the sum of Two Hundred and Fifty ($250.00) Dollars for the payment of which, well and truly to be made, we and each of us bind ourselves, our successors and assigns jointly and severally firmly by these presents.

Conditioned nevertheless that whereas the said Seaboard Air Line Railway Company has applied or will apply to the City Court of Chatham County, Georgia to remove the case pending therein filed to the November 1925 Term of said Court, wherein the said John W. Gleason is plaintiff and the said Seaboard Air Line Railway Company is defendant, to the District Court of the United States for the Eastern Division of the Southern District of Georgia. Now, therefore if said Seaboard Air Line Railway Company shall enter in said District Court of the United States within thirty (30) days from the filing of said petition for removal a certified copy of the record of said suit as required by law, and shall pay or cause to be paid all costs that may be awarded therein, by said District Court of the United States if the said District Court shall hold that said suit was improperly or wrongfully removed
16 thereto. Then this obligation shall be void, but otherwise it shall remain in full force, effect and virtue.

Given under our hands and seals at Savannah, Georgia, this 31st day of October, A. D. 1925.

SEABOARD AIR LINE RAILWAY COMPANY. (L. S.)
By S. M. DUTTON,
As Principal, Superintendent.
INDEPENDENCE INDEMNITY COMPANY,
By JOHN D. CARSWELL,
(Seal) As Surety, Resident Vice President.

Approved and accepted this October 31st, 1925.

THOMAS S. RUSSELL,
Deputy Clerk City Court of Savannah.
DAVIS FREEMAN,
Judge, City Court of Savannah.

17 ORDER OF REMOVAL.

In the City Court of Savannah, Chatham County, Georgia. November Term, 1925.

John W. Gleason doing business as John W. Gleason Cotton Company,
vs
Seaboard Air Line Railway.

Petition and Bond for Removal of case to District Court of the United States, etc.

The petition in this matter having been considered and the bond tendered by the petitioner having been accepted

and approved. It appearing that the petition upon its face shows a removable cause, it is thereupon ordered that the said cause be removed from this Court to the District Court of the United States for the Eastern Division of the Southern District of Georgia, and the Clerk of this Court is hereby directed to make and certify a transcript of the record pursuant to the statutes of the United States in that behalf provided. And it is further ordered that all other and further proceedings in this Court in said cause be stayed.

This 2nd day of November, 1925.

DAVIS FREEMAN,
Judge, City Court of Savannah, Chatham County, Georgia.

Indorsement: Common Law, No. 1595. Transcript of Record from City Court of Savannah. Filed in office November 7th, 1925.

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18 FIRST AMENDMENT TO PETITION.

In the District Court of the United States for the Savannah Division of the Southern District of Georgia.

John W. Gleason doing business as John W. Gleason Cotton Company,

vs. No. 1595

Seaboard Air Line Railway Company.

Now comes the plaintiff, John W. Gleason doing business as John W. Gleason Cotton Company, and with

leave of the Court first had and obtained, amends his petition in the above styled cause in the following particulars:

1. By adding a paragraph immediately following the 10th paragraph of the first count of the said petition to read as follows:

10a. The said draft and bill of lading were held by the Citizens and Southern Bank of Savannah for collection only and no bank or any other person had made advances upon them nor had any interest in them and this plaintiff, at any time prior to 9 a. m. March 20, 1923, when the said Ten Thousand ($10,000.00) Dollars was delivered to the said Tillman, could have stopped payment and delivery of the said amount and recalled the same.

2. By striking the last five (5) lines of the first count of the petition and placing in lieu thereof, the following:

That by reason of the defendant's failure and neglect to safely carry the said cotton and deliver it to your petitioner which failure and neglect was a violation of its duty as a common carrier as imposed by law, that the defendant has endamaged your petitioner in the sum of Ten Thousand ($10,000.00) Dollars as above set forth, for which plaintiff prays judgment and that process do issue requiring the said defendant to be and appear at the next term of this Honorable Court to answer your petitioner on the merits of the foregoing complaint, which sets forth a cause of action ex delicto.

3. By striking the words and figures "Twelve Thousand Five Hundred ($12,500.00) Dollars" from the 10th

paragraph of the second count of the petition and substituting in lieu thereof, the words and figures "Ten Thousand ($10,000.00) Dollars."

19 4. By striking the words and figures "Twelve Thousand, Five Hundred ($12,500.00) Dollars" from the 13th paragraph of the third count of the petition and substituting in lieu thereof, the words and figures "Ten Thousand ($10,000.00) Dollars."

HARTRIDGE, WRIGHT & BRENNEN,
Plaintiff's Attorneys.

Allowed subject to objection and or demurrer, this 13th day of October, A. D. 1926.

WM. H. BARRETT,
United States District
Judge.

Filed in office October 15th, 1926.

20 (Title Omitted.)

To the Honorable William H. Barrett, United States Judge:

Now comes the plaintiff and shows that on October 15th, 1926, at the present term of this Honorable Court an order was entered overruling all of the demurrers filed by the defendant to the plaintiff's petition except the special demurrer to paragraph Six of the Third Count of the said petition; that the said demurrer to Paragraph Six of the Third Count of the petition was sustained and it was further ordered that the petition be amended within ten (10) days to meet the ruling in regard to the special demurrer of the Sixth Paragraph of the Third Count of the petition.

That no further order has been entered in the said cause.

Wherefore, petitioner prays that the said order be modified so as to permit the plaintiff to now file an amendment to meet the special demurrer to the Sixth Paragraph of the Third Count, and that the amendment hereunto attached be allowed and that it be adjudged that the said amendment meets the requirements of the above mentioned order.

HARTRIDGE, WRIGHT & BRENNEN,
Plaintiff's Attorneys.

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21 SECOND AMENDMENT TO PETITION.

(Title Omitted.)

Now comes the plaintiff, with leave of the Court first had and obtained, and amends the original petition filed in the above cause by adding to the the Sixth Paragraph of the Third Count the following words:

"That the defendant received knowledge of all matters set forth in this paragraph through Hugo G. Glaiser, its duly authorized agent at Savannah, and through John Moylan, its chief clerk at Savannah."

HARTRIDGE, WRIGHT & BRENNEN,
Plaintiff's Attorneys.

22 (Title Omitted.)

The foregoing petition read and considered, it is ordered that the order heretofore entered at this term on October 14, 1926, be amended so as to permit plain-

tiff to file an amendment within twenty (20) days of the said order of October 15, 1926, to meet the special demurrer to the Sixth Paragraph of the Third Count of the petition.

It is further ordered, that the amendment annexed to the foregoing petition be and the same is hereby allowed and that the said amendment meets the requirements of the said order of October 15th, 1926. This is allowed over objections of defendant.

In open Court, this 1st day of November, A. D. 1926.

WM. H. BARRETT,
Judge, United States Court.

Filed in office November 1st, 1926.

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23 THIRD AMENDMENT TO PETITION

(Title Omitted.)

Now comes the plaintiff and with leave of Court first had and obtained, amends his petition by striking the words and figures "Ten Thousand ($10,000.00) Dollars, from the prayer and concluding paragraph of each count of his petition as amended and placing in lieu thereof the words and figures "Eleven Thousand, Three Hundred and Forty ($11,340.00) Dollars," so that each count of the said petition shall pray for a judgment in the sum of Eleven Thousand, Three Hundred and Forty ($11,340.00) Dollars.

HARTRIDGE, WRIGHT & BRENNEN,
Plaintiff's Attorneys

Allowed this Feb. 23rd, 1927.

WM. H. BARRETT,
U. S. District Judge.

Filed in office February 23rd, 1927.

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24 ANSWER OF DEFENDANT

(Title Omitted.)

Subject to demurrers heretofore filed, defendant answering the petition filed in the above matter shows:

First Count.

One.

Defendant admits the allegations set forth in paragraph 1 of said count.

Two.

Defendant admits the allegations set forth in paragraph 2 of said count.

Three.

Defendant denies the allegations contained in paragraph 3 of said count.

Four.

Defendant denies the allegations contained in paragraph 4 of said count.

Five.

Defendant admits the allegations in paragraph 5 of said count except that bill of lading and indorsement were forged as hereinafter more fully set forth.

Six.

Defendant denies the allegations set forth in paragraph 6 of said count.

Seven.

Defendant can neither admit nor deny allegations set forth in paragraph 7 for lack of sufficient information.

25 Eight.

Defendant denies the allegations of fact set out in paragraph 8 of said count.

Nine.

Answering paragraph 9, defendant denies that it is estopped to deny allegations of paragraph 1, 2, 3, 4 and 5, because of an estoppel as alleged, for following reasons:

A. Not Furtherance of Master's Business.

Some time prior to March 17, 1925, said MacDonnell conceived a plan of swindling the Gleason Cotton Company to his own enrichment. MacDonnell then, on or about the 17th day of March procured leave from the Seaboard Air Line Railway Company to be absent from

his duties in Savannah to attend to private business. He proceeded to Charleston on the 18th where in furtherance of his fraudulent scheme and completely without the real or apparent scope of his employment, he issued a forged bill of lading in the name of a fictitious person, being the aforesaid bill of lading, and drew on the Gleason Cotton Company through the Bank of Charleston for Ten Thousand Dollars ($10,000) Dollars. The next day, March 19th, in furtherance of his fraudulent scheme and to effect said purpose of his own entirely independent of the Railway and in no way in furtherance of its business but rather directly against its interest, upon being telephoned by Gleason Cotton Company, he stated to it that the car had arrived in Savannah. The draft was then paid as stated. MacDonnell then procured another leave of absence from his employment and proceeded to Charleston where he presented himself, or caused a confederate to do so, at the Bank of Charleston and collected the Ten Thousand Dollars ($10,000.00) which had been forwarded from Savannah. He then decamped with same for parts unknown and has since remained a fugitive from justice.

4. Negligent

The negligence of the Gleason Cotton Company caused or contributed to the loss sustained in that it ignored highly suspicious circumstances and conducted itself with careless indifference as to means of in-
26 formation reasonably at hand when they were dealing with a person whom they had never seen or heard of, and were informed by the Citizens & Southern Bank, through whom the draft was forwarded, upon presentation of same and before payment that said Tillman came to the Bank of Charleston unidentified.

C—After Loss.

The receipt for bill of lading can form no part of the estoppel as same was given subsequent to the payment of draft after Gleason Cotton Company had acted to its loss.

Ten.

Defendant admits allegations in paragraph 10 except that money was paid to MacDonnell or someone acting with him.

Eleven.

Defendant admits that it failed and refused to deliver said cotton to plaintiff but, for lack of sufficient information, is unable to admit or deny the value of said cotton as alleged.

Further answering said paragraph defendant says that the Gleason Cotton Company were not the owners of said cotton but were merely factors who advanced the sum of Ten Thousand Dollars ($10,000.00) against same. Beyond that they had no further interest in said cotton.

Twelve.

Further answering defendant says that plaintiff is not entitled to recover in this case because of facts set out in paragraph 9 of this answer which are urged as an answer to the said count as well as the estoppel claimed in said paragraph 9.

Second Count.

One.

Defendant admits the allegations contained in paragraphs 1, 2, and 3 of said count.

27

Two.

For lack of sufficient information defendant can neither admit nor deny the allegations contained in paragraph 4 of said count.

Three.

Defendant denies the allegations contained in paragraph 5 of said count.

Four.

Defendant denies the allegations contained in paragraph 6 of said count.

Five.

Defendant admits the allegations contained in paragraph 7 of said count except that the said draft and bill of lading were properly indorsed by J. A. Tillman.

Six.

Defendant denies the allegations set forth in paragraph 8 of said count.

Seven.

Defendant admits the allegations contained in paragraph 9 of said count.

Eight

Defendant denies the allegations and conclusions set forth in paragraph 10 of said count.

Nine

Further answering said second count defendant shows:

Some time prior to March 17, 1925, said MacDonell conceived a plan of swindling the Gleason Cotton Company to his own enrichment. MacDonell then, on or about, the 17th day of March procured a leave from the Seaboard Air Line Railway Company to be absent from his duties in Savannah to attend to private business. He proceeded to Charleston on the 18th where in furtherance of his fraudulent scheme and completely without the real or apparent scope of his employment, he issued a forged bill of lading in the name of a fictitious person, being the aforesaid bill of lading, and
28 drew on Gleason Cotton Company through the Bank of Charleston for Ten Thousand Dollars ($10,000.00). The next day, March 19th, in furtherance of his fraudulent scheme and to effect said purpose of his own, entirely independent of the Railway and in no way in furtherance of its business but rather directly against its interest, upon being telephoned by Gleason Cotton Company, he stated to it that the car had arrived in Savannah. The draft was that paid as stated. MacDonnell then procured another leave of absence from

his employment and proceeded to Charleston where he presented himself, or caused a confederate to do so, at the Bank of Charleston and collected the Ten Thousand Dollars ($10,000.00) which had been forwarded from Savannah. He then decamped with same for parts unknown and has since remained a fugitive from justice.

Ten.

Further answering said count defendant says that the negligence of Gleason Cotton Company caused or contributed to the loss sustained in that it ignored highly suspicious circumstances and conducted itself with careless indifference as to means of information reasonably at hand when they were dealing with a person whom they had never seen or heard of, and where informed by the Citizens & Southern Bank, through whom the draft was forwarded, upon presentation of same and before payment that said Tillman also came to the Bank of Charleston unidentified.

Eleven.

And further answering says that the Gleason Cotton Company were not the owners of said cotton but were merely facts who advanced the sum of Ten Thousand Dollars ($10,000.00) against same. Beyond that they had no further interest in the said cotton.

29 Third Count.

One.

Defendant admits the allegations set forth in paragraphs 1, 2 and 3 of said count.

Two.

Defendant, for lack of information, can neither admit nor deny the allegations set forth in paragraph 4 of said count.

Three.

Defendant denies the allegations contained in paragraph 5 of said count.

Four.

Defendant denies the allegations contained in paragraph 6 of said count.

Five.

Defendant admits the allegations contained in paragraph 7 of said count.

Six.

Defendant admits the allegations contained in paragraph 8 of said count except that the said MacDonell was then and there acting within the scope of his authority as agent—he being then and there, as a matter of fact and as shown by other allegations in said count, acting pursuant to a plan conceived of swindling the Gleason Cotton Company to his own enrichment being in furtherance of a fraudulent scheme and to effect a purpose of his own, entirely independent of the Railway and in no way in furtherance of its business, but rather directly against its interests.

Seven

Defendant denies the allegations set forth in paragraph 9 of said count.

Eight

Defendant can neither admit nor deny the allegations set forth in paragraph 10 of said count.

Nine

Defendant admits the allegations contained in paragraph 11 of said count.

Ten

Defendant denies the allegations contained in paragraph 12 (a) and (b) of said count.

Eleven

Defendant denies the allegations contained in paragraph 13 of said count and further says that the Gleason Cotton Company were not the owners of the said cotton but were merely factors who had advanced the sum of Ten Thousand Dollars ($10,000.00) against same. Beyond that, they had no further interest in the said cotton.

And having fully answered defendant prays that it may be hence dismissed with its reasonable costs incurred.

ANDERSON, CANN & CANN,
CONNERAT & HUNTER,
Attorneys for Defendant.

Filed in office December 3rd, 1925.

31 VERDICT OF THE JURY.

Savannah, Georgia, February 24, 1927.

We, the Jury, find for the Defendant on the first count.

WM. M. BESSELLIEU,
Foreman.

We, the Jury find for the Plaintiff in the Second & Third counts in the sum of Eleven Thousand Three Hundred & forty Dollars ($11,340.00).

WM. M. BESSELLIEU,
Foreman.

Filed in office February 24, 1927.

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32 JUDGMENT

(Title Omitted.)

The jury impaneled to try said case having on the 24th day of February, A. D. 1927, rendered a verdict for the Plaintiff on the second and third counts of the petition for the sum of Eleven Thousand Three Hundred and Forty ($11,340.00) Dollars;

Upon motion of the Plaintiff, judgment is hereby rendered for the plaintiff and against the Defendant, Seaboard Air Line Railway Company, on the second and third counts of the plaintiff's petition for the sum of Eleven Thousand Three Hundred and forty ($11,340.00) Dollars principal with interest from this date at the

rate of seven (7%) percent per annum and the sum of [illegible] Dollars for cost of suit and all future cost.

This 25th day of February, A. D. 1927.

HARTRIDGE, WRIGHT & BRENNAN,
Plaintiff's Attorneys.

Judgment signed and filed this 25th day of February, A. D. 1927.

MARGARET CLARKE,
Deputy Clerk United Court
for the Southern District
of Georgia.

Filed in office February 25th, 1927.

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33 BILL OF EXCEPTIONS

(Title Omitted.)

Be it remembered that on the 23rd day of February 1927, during the February Term of said Court there came on to be heard before the Honorable William H. Barrett, District Judge, presiding and a jury impaneled and sworn to try the issues joined, the above stated case, which was an action by the Cotton Company against the Railroad for damages because of the fraudulent act of one MacDonnell, its agent, brought in three counts; the Second Count of which was based upon the representation of said MacDonnell to the Cotton Company that certain cotton had arrived and was in Savannah, relying upon which the Cotton Company honored a draft to its loss, there being no such shipment of cot-

ton, as a matter of fact; and the Third Count of which was based upon allegations repeating the representation set forth in second count and further alleging that the Seaboard prior to that time had knowledge of previous dishonest acts of MacDonnell and was, therefore, negligent in keeping him in a position of trust, which negligence caused the Cotton Company damage. The jury impaneled to try said case on the 24th day of February, 1927, rendered a verdict for the plaintiff on the second and third counts in the sum of $11,340.00 which was made the judgment of the Court, the evidence introduced upon the trial of the said case being as follows:

34 Plaintiff:

The bill of lading we surrendered to Mr. MacDonnell. Didn't you have an agreement with Mr. Brennan that Mr. MacDonnell had destroyed the bill of lading?

Defendant:

We stand ready to admit it now.

Court:

If you admit it now, don't let's have any discussion about it.

HERBERT P. DILLON, a witness called by the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q What is your name?
A Herbert P. Dillon.
Q What is your employment?

A Clerk for the John W. Gleason Cotton Co.

Q In Savannah?

A Yes, sir.

Q How long have you been connected with that concern?

A I have been connected with them since 1919.

Q You were there during March of 1925?

A Yes, sir.

Q What were your duties during that time, on March 17th, 18th and 19th, 1925?

A Account sales clerk.

Q What is the business of the John W. Gleason Cotton Company?

A Cotton factors.

Q What were your duties as account sales clerk?

A Well, I look after cotton shown on board.

Q Did you know a man by the name of MacDonnell over at the Seaboard Air Line Railway terminals?

A Yes, sir.

Q Where were his duties?

A Across on the Island.

Q What were his duties with reference to Cotton Factors?

A He advised you where you had order notify bills of lading for cotton, he generally called us up over the 'phone on the arrival of the cotton.

Q How long had he been in that position?

A Three or four years to my knowledge.

Q You ever have any transaction with him yourself on the telephone?

A Yes, sir.

Q You know his voice?

A Yes, sir.

Q You recall whether or not you had a conversation on the 17th of March with him, of 1925? No, March 19th?

A Yes, sir.

Q Do you recall the conversation that you had with him on March 19th?

A Yes, sir.

Q About what time of day was it?

A About nine-fifteen in the morning.

Q Where were you?

A At the office of the company.

Q At the office of the Jno. Gleason Cotton Company?

A Yes, sir.

Q Who was it there?

36 A MacDonnell.

Q How do you know it was MacDonnell?

A He told me it was MacDonnell and I recognized his voice.

Q What was the conversation between you two at that time?

A Mr. MacDonnell called me up at 9.15 in the morning and told me there were three cars of cotton on the Terminals of the Seaboard Air Line Railway Company, consigned by J. A. Tillman to the John Gleason Cotton Company.

Q Did he mention the number of bales of cotton?

A Yes, sir; 110.

Q What did you say to him?

A I said that we had not received the bill of lading, and that when we did we would call him up and let him know.

Q What is the custom as to the bills of lading—or where is your warehouse, by the way?

A Over on the Atlantic Coast Line Railroad.

Q On the Savannah side of the river?

A Yes, sir.

Q How do you get possession of the cotton under these circumstances coming from the Seaboard Air Line terminals that are to be delivered over here?

A We surrender the bills of lading to the Seaboard Air Line Railway and they transport them.

Q What do you get in place of the bill of lading?

A We receive a receipt.

Q Look at this paper for me, please—what is that?

A That is the receipt we got.

37 Q Is that the customary receipt that you get?

A Yes, sir.

Q Do you know where that bill of lading is now?

A No, sir.

Q You do not?

A No, sir.

Plaintiff:

Well, your Honor, I believe it was admitted it was destroyed.

Defendant:

By Mr. MacDonnell?

Plaintiff:

It is admitted it was destroyed by Mr. MacDonnell.

Court:

Very well.

Q Was that the entire correspondence between you, or communication between you?

A Yes, sir.

Q. What did he want with the bill of lading?

A. He said he wanted to get the cotton over to us on the four o'clock drill.

Q. What is that?

A. He said if you get the bill of lading to the Seaboard Air Line Railway before twelve o'clock noon that the cotton would be transported at four o'clock that afternoon.

Cross Examination.

Q. Had you ever heard from Mr. J. A. Tillman before?

A. No, sir.

Q. Did you have anything to do with that part of the business of the Gleason Cotton Co.?

A. Of what part?

Q. Of the investigation of customers?

38 A. No, sir.

Q. What were your duties?

A. To send out account sales on the cotton, and I inspected some cotton on the road.

Q. You had nothing to do with the financial end of the business?

A. No, sir.

Q. You are generally familiar with the cotton business?

A. To a certain extent, yes, sir.

Q. The shipping end of it?

A. What do you mean by the shipping end of it?

Q. Dealings with the shipments that come into Savannah? You know where most of the shipments came from?

A. Yes, sir.

Q You ever hear of one coming to Savannah before from Charleston?

A No, sir.

Q Never in your experience?

A No, sir.

Q Charleston is an export town?

A I don't know what it is. I never handled any before from Charleston. I never handled that end of it.

Q Were you there when the draft was cashed?

A Was I there?

Q Yes?

A Yes, sir.

Q Did you see it?

A I saw the bill of lading when he brought it in.

Q Who brought it in?

A The Citizens & Southern Bank presented it. I don't know who brought it in.

Q Who was it presented to?

A To the Cashier.

Q Who was the Cashier?

A Captain McCarthy.

Q Do you know anything about the grade of this reported cotton?

A No, sir, I do not.

Q You made no attempt to find out?

A No, sir, I didn't know anything about the grades.

By the Court:

Q What is the custom where a bill of lading comes in from a regular customer of the Gleason Cotton Company, as to your ascertaining whether or not the cotton itself has arrived? Or do you know whether or not they pay the draft with bill of lading attached without ascertaining if the cotton has come in?

A On an order notify shipment they generally call you up and tell you they have the shipment.

Q Who do you mean? Who calls you up?

A Any Railroad.

Q You know whether or not it is the custom to pay the draft, taking up the bill of lading before that information shall have reached you?

A No, sir; I do not know whether they do that or not. Mr. Gleason handles that part of it.

Q That is the custom of all the roads to notify you when the cotton has been received, actually been received?

A Yes, sir.

Q Was there anyone else during that period of March, 1925, who acted for the Seaboard Air Line Railway in giving this information other than Mr. MacDonnell?

A No, sir. I don't recall any other.

Q He had been acting in that capacity for some time?

A Yes, sir.

Q The cotton had been shown to be there in due course, according to the notices he gave you from time to time?

A Yes, sir.

Q Had there been any other instance where cotton was not there when he notified you it was there?

A No, sir; never any before.

Witness excused.

JNO. J. DOOLAN, a witness called by the Plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Q What is your name?

A John J. Doolan.

Q What was your employment in March, 1925?

A I was employed by the Jno. W. Gleason Company, and am still there.

Q What were your duties?

A Almost a little bit of everything.

Q How long have you been engaged in the cotton business?

A Since 1913.

41 Q How long have you been with Mr. Gleason?

A I was with him from the start. I think he went back in business in 1918 and when I returned from the army I went back with him in 1919. It was the John Flannery Company.

Q How does the John W. Gleason Co. ascertain when they receive a draft that the cotton for which the draft is drawn has been received in Savannah?

A If we have not been advised by him we call him up by telephone, especially with the Seaboard Air Line, as they are across the river, and their chief cotton clerk notifies us if the cotton is there or not.

Q Did you know Mr. MacDonnell while he was over there?

A Yes, sir.

Q What was his position with the Seaboard Air Line?

A He was chief cotton clerk.

Q What were his duties with reference to notifying factors?

A It was his duty to call us on the 'phone and notify us of the shipment or order notify shipment.

Q This present shipment was an order notify shipment?

A Yes, sir.

A [Q.] Was that always done?

A I would say 95 out of a 100, or 100 percent.

Q That is where you get your information?

A Yes, sir.

Q Would you do it?

42 A If we knew the customer we would call up the railroad and ask if the cotton was there.

Q Suppose you didn't know the customer?

A We would then rely entirely upon the information furnished by the Seaboard Air Line Railway.

Q That would come through whom?

A The cotton clerk.

Q Did you know Mr. MacDonnell personally?

A Yes, sir.

Q You all ever do any business with the Seaboard Air Line Railway with reference to the sale of cotton?

A Yes, sir; Mr. MacDonnell used to handle the overs.

Q What do you call overs?

A Cotton the Seaboard Air Line Railway had that had probably gone short to someone else, and put there on sale.

Q What would you do?

A Sell it off there.

Q Your relations with the Seaboard Air Line Railway satisfactory?

A It was said to be, by Mr. Glaither.

Q Who was he?

A He was the agent.

Q Where was his office?
A With Mr. MacDonnell's.
Q Across the river at the Seaboard Air Line Railway Terminals?
A Yes, sir.
Q Did you ever have a conversation with Mr. MacDonnell on the subject of cotton shipments?
A Yes, sir, quite frequently.
Q When was the first one with reference to the shipments generally?
A I talked to him practically every day.
Q What was the substance of the conversation?
A Generally where we had cotton over there would say, "If you have the bills of lading, send them over."
Q When did you first come in personal contact with the shipment?
A When the draft came in with the bill of lading attached, I notified Mr. MacDonnell.
Q What date was that?
A March 16th.
Q Would you know the draft if you saw it?
A Yes, sir.
Q Can you identify that paper?
A Yes, sir.
Q It came in on what date?
A March 19th.
Q What year?
A 1925.
Q You recall about what time?
A That draft came in I suppose between ten and eleven o'clock. The usual hour that the banks deliver the drafts.
Q What time do the banks close on week days?
A They close at two o'clock.

Q. And this was on a week day?

A. Yes, sir.

Q. And the draft came in between ten and eleven o'clock?

A. I imagine that is the time.

Q. You approximate that time?

A. Yes, sir.

Q. What you do when that draft came in?

A. That draft, with other drafts, was presented to our bookkeeper.

Q. From where?

A. From the Citizens & Southern Bank.

Q. This draft came from the Citizens & Southern Bank?

A. Yes, sir.

Q. And what did you do?

A. It was presented with other drafts to the bookkeeper and the bookkeeper would make his various memorandums.

Q. What did you do?

A. I notified Mr. MacDonnell.

Q. How did you notify him?

A. By telephone.

Q. How did you know it was Mr. MacDonnell that you were talking to over the telephone?

A. I recognized his voice.

Q. Where did you call him?

A. 627 was the telephone number.

Q. You recognized the voice of the man who communicated with you over the telephone?

A. Yes, sir.

Q. Now, please tell the Court and Jury just what the conversation with Mr. MacDonnell was?

A. I told Mr. MacDonnell that we had the bill of lading covering the 110 bales of cotton.

Q. Did you have any conversation with Mr. Doolan on the subject of the draft before the draft came in?

A. Yes, sir.

Q. And told him what?

A. I had spoken to Mr. Doolan earlier in the morning with reference to the matter.

Q. What response did he make?

A. He said "get the bill of lading over to me as promptly as possible, and I will get the cotton to you on the four o'clock drill."

Q. What did that mean?

A. That the cotton would get to our warehouse early next morning.

Q. Did he tell you the cotton was there?

A. Yes, sir.

Q. What became of the draft?

A. The draft was returned to the Cashier for payment, with other drafts.

Q. Who is the Cashier?

A. Captain MacCarthy.

Q. You lost touch of the draft after that? Is that true or not.

A. Yes, sir.

Q. And that was between ten and eleven o'clock in the morning?

A. Yes, sir.

Q. Was it the two or four o'clock drill?

A. Four o'clock drill.

Q. Was the cotton delivered on the four o'clock drill?

A. No, sir.

Q Do you happen to know what time the bill of lading was sent over to Mr. MacDonnell? You see it yourself leave the office?

A I had the bill of lading myself up to about one-thirty.

Q What did you do with it?

A I gave it to the man that handles the bills of lading.

Q What is his name?

A Cliff Rye.

Q Is he with you now?

A No, sir.

Q Up here today?

A Yes, sir.

Q What would he do with it?

A On all order notify bills of lading he would take a receipt for it when delivered. Make up a receipt.

Q Did you ever see the receipt for this bill of lading?

A Yes, sir; many times.

Q Is that it?

A Yes, sir.

Q Do you know Mr. MacDonnell's hand writing?

A Yes, sir.

Q Is that his hand writing?

A Yes, sir; Mr. MacDonnell's hand writing.

Plaintiff:

If the Court please, I would like to introduce this receipt in evidence at this point, so we will have it here to refer to.

17 Defendant:

No objection, your Honor.

Plaintiff:

This is a paper, dated Savannah, Ga., March 19th, 1925, as follows:

"Savannah, Ga., 3 19 25.

Received from John W. Gleason Cotton Company the following Bills of Lading issued by Seaboard Air Line Ry.

Date Shipper Issued at Mark No Bc 1 No.
3 18 25 J. A. Tilman Charleston, S. C. JAT 110

(With the following stamp in purple ink):

"Seaboard Air Line Railway, Received Mar. 19, 1925, Cotton Dept., Savannah, Ga."

With the initials "MacD" across the stamp.

Plaintiff:

We would like to have that marked as

PLAINTIFF'S EXHIBIT No. 4

Q. What was your next connection with this transaction? That was about one o'clock that you gave it to the man?

A. About one-thirty.

Q. What was your next association, if any?

A. You want me to tell what became of that bill of lading?

Q. No, you gave it to him and that was the last you saw of it?

A. Yes, sir.

Q. And that is the receipt for it?

A. Yes, sir.

Q. The bill of lading was left with the Railway Company?

A. Yes, sir.

Q. And that was the custom prevailing at
48 that time?

A. Yes, sir; with all railroads.

Q. With whom would the bill of lading be left?

A. With the cotton clerk.

Q. You receive that receipt in lieu of it?

A. Yes, sir.

Q. What happened after that? What you know about it?

A. The next morning Mr. Gleason called me from the warehouse.

Q. Now, you had a conversation with Mr. Gleason, but don't state the substance of it?

A. I called the Seaboard Air Line Railway, telephone No. 627, again, and I asked for Mr. MacDonnell.

Q. Did you know who you were talking to?

A. No, sir.

Q. Did you get Mr. MacDonnell?

A. No, sir. Mr. MacDonnell was not there.

Q. Did you get in touch with anyone?

A. I asked for Mr. Moyland.

Q. Who was he?

A. The Chief Clerk to Mr. Glaiber, the agent.

Q. Did you know his voice over the telephone?

A. Yes, sir.

Q. Do you know him personally?

A. Yes, sir.

Q. What was your conversation?

Defendant:

If it please the Court, we object to any conversation he may have had with Mr. Moyland, as the estoppel which is alleged, sets up conversations with Mr. MacDonnell, and alleges their action purely on the strength of Mr. MacDonnell's representations and his actions.

Court:

I am somewhat in the dark myself as to what is expected to be proved by this. I don't know. I don't know whether you want to argue it in the presence of the jury or not—come up here and tell me.

(Conference with the Court at the Bench.)

Q. Now, you leave the telephone communication please, out of your mind, don't become confused and go back into that. I don't want you to confuse it. Did you see Mr. Moyland personally any time after this conversation?

A. On the morning of the 20th Mr. Moyland called at our office, and Mr. Glaiber.

Q. Do you know them personally?

A. Yes, sir.

Q. They called at whose office?

A. J. W. Gleason Cotton Company's office.

Q. Did you have a conversation with them?

A. Yes, sir; had quite a lengthy conversation with them.

Q. Who was doing the talking, you recall that?

A. Both of them.

Q. State to the jury in substance, as near as you can remember, the exact language, what the conversa-

tion was between Mr. Moyland and Glaiber on the other hand, and yourself, on the morning of the 20 of March?

A. Mr. Glaiber and Mr. Mayland called at our office after Mr. Mayoland had told me there was a forgery—

Q. That was the telephone conversation?

A. Yes, sir.

Q. You cannot go into that. The telephone conversation was on the 19th?

50 A. Yes, sir; on both dates.

Q. You have one on the 20th?

A. Yes, sir.

Q. Omit then both of the conversation. On the morning of the 20th what time did they call to see you?

A. About one o'clock, I think they were on their way to dinner.

Q. What time did the clerks of the Seaboard Air Line Railway leave across the river to come to this side of the river?

A. I think the majority of them leave about one o'clock.

Q. They have a ferry boat they come on?

A. Yes, sir; they have regular schedules. They live up to them pretty well when the boat is running. If they don't they have no boat, and negroes row them across.

Q. Go ahead with the conversation?

A. Mr. Glaiber and Mr. Moyland both were discussing with me about the matter that had transpired, in other words, that Mr MacDonnell had skipped out, had forged this lading, etc., and were very sympathetic with us and offered to do what they could to help us, and agreed to push the claim, and that we get the money as quickly as possible, having lost the money in payment of the cotton.

Court:

Push what claim?

A. They told us if we would put our claim in for the loss they would try to hasten it to a conclusion, for this particular cotton.

Q. Go ahead?

51 A. Mr. Moyland and Mr. Glaiber admitted to me that they had enough evidence on Mr. MacDonnell, previous evidence, that they had been checking up on him with the aid of the special agent, to be convinced he was the man committing the wrong doings over there in regard to other transactions, which I was not familiar with. We asked him if Mr. MacDonnell was under bond—

Court:

Leave that out, about the bond.

Defendant:

I object to that testimony your Honor, as being irrelevant and immaterial.

Court:

I think so. I rule it out.

Q. Leave that part out then. The part I want to direct your attention to is the knowledge of Mr. Moyland before this transaction?

A. Yes, sir; either one or the other made the statement, and whichever made the statement the other confirmed it.

Cross Examination

Q. Who did you say signed this receipt?

A. The receipt is signed by Mr. MacDonnell.

Q. Then you were incorrect when you said that Mr. Reckling signed it?

A. I didn't mean to say it, if I did.

Court:

He said Mr. MacDonnell signed it.

Q. As a matter of fact this is a form that you all take over there, prepared by your office?

A. Yes, sir.

Q. Mr. Doolan, had you ever heard of J. A. Tillman before in your life?

A. I had seen a letter that was written to the John W. Gleason Cotton Company, I mean by the
52 John W. Gleason Cotton Co. soliciting the handling of the cotton, and the letter was not returned to us, and was addressed to J. A. Tillman, care the New Charleston Hotel, as I recall.

Q. One or two days before the draft was received?

A. It was written on the 17th of March.

Q. Had you ever investigated this purported man Tillman, who had 110 bales of cotton in Charleston?

A. Had no reason to investigate him.

Court:

Just answer his question?

A. No, sir; we did not.

Q. You ordinarily investigate your customers before you advance any large sums?

A. Not where we are advised of cotton being in, no, sir.

Q. Did you know anything about this cotton, its grade?

A. Did I know anything about this cotton? There was no cotton.

Q. If it had been there would you make any effort to find out what kind of cotton it was?

A. We agreed to advance a price that would protect us in the grade of the cotton. Regardless of what the grade was we had advanced only enough to protect us against low grade cotton.

Q. If that had been low grade cotton you would have advanced more than it was worth?

A. No, sir; that price took care of that.

Q. You advanced $10,000 on 110 bales of cotton?

A. That is correct.

Q. You would have had to have gotten 20c approximately a pound to have come out on the cotton?

53 A. About 18c I think, is correct.

Q. If it had been a very low grade of cotton you wouldn't have come out all right?

A. Yes, sir; it would have had to have been "dogs" not to have gotten our price out of it.

Q. It could have been "dogs" and you wouldn't have known it?

A. No, sir.

Q. You knew at this time did you not, that the Bank of Charleston reported to you or your office, before you cashed this draft, that Mr. J. A. Tillman came to them unidentified, and that they urged care before this payment was made?

Plaintiff:

If the Court please, if that was a communication held by the Bank of Charleston with these people in Savannah, I submit it must be in writing, and the writing would be the best evidence.

Court:

No, sir; he asked if this witness knew it.

Defendant:

Repeat that question please?

(Question repeated.)

Plaintiff:

Then my objection is good, Your Honor. These people were in Charleston and the others in Savannah, and I submit if there is any writing the writing would be the highest evidence.

Defendant:

There is no attempt to go into the contents of a written instrument.

Court:

You are asking—you do not say in writing, but the assumption is it is in writing, but whether he did not say a writing contained a certain fact stated.

54 Plaintiff:

I will frame my question differently.

Q Were you not put on notice before this draft was passed for payment that the Bank of Charleston did not know J. A. Tillman and they urged care before this draft should be paid?

A No, sir.

Q You did not?

A No, sir.

Q Yet you handled the payment of the draft?

A No, sir; I did not handle it.

Q. How long have you been in the cotton business?

A. Since 1913.

Q. Do many shipments of cotton come from Charleston, S. C., to Savannah, Ga.?

A. I couldn't give you the number of bales that might come, but cotton comes to Savannah from all localities.

Q. None from other sea port towns?

A. Yes, sir; from other sea port towns?

Q. When have you ever gotten a shipment of cotton from Charleston besides this one?

A. I don't recall personally ever having gotten any cotton any cotton from Charleston.

Q. It is so rare that you couldn't recall an incident?

A. I have not had occasion to make a record of where any cotton came from Charleston.

Q. But you can say off hand that cotton came from interior points, such as Claxton, Ga., but you don't recall a shipment of cotton having been shipped from Charleston to Savannah?

55 A. I have heard of times that Factors in Savannah got cotton from Charleston.

Q. But you personally never have?

A. No, sir; I never have.

Q. Has the Gleason Cotton Company ever gotten any cotton and it was a forged matter?

A. I don't recall.

Q. Now, this conversation that you say you had with Mr. Glaiber and Mr. Moyland on the 20th, did Mr. Glaiber at that time tell you he could not and would not admit liability?

A. That day?

Q. He did tell you that one day?

A. He said he was not in position to assure us of responsibility on the part of the Seaboard Air Line Railway.

Q. That was at one o'clock?

A. Some where around one o'clock.

Q. On the 20th?

A. Yes, sir.

Q. And the draft had been paid the day before, on the 19th?

A. That is correct.

Q. And it had been paid the day before, and this was after that, and after it was discovered there was no cotton and it was a forged matter?

A. Some time after they discovered it, I think it was about one o'clock, or some time after they discovered there was a forgery involved.

Q. About how much time before that had
56 you had the first suspicion it was a forgery?

A. I think Mr. Moyland probably around mid-day told me that he had been—

Plaintiff:

If the Court please, I would like to ask the witness if that was by telephone?

A. Yes, sir.

Plaintiff:

We ask then that he go into the whole conversation.

Court:

Why open the door?

Defendant:

No objection to that, your Honor.

Q. Mr. McCarthy you say, handled the financial end of your business?

A He draws the check for the bank.

Q Who o' k'd those drafts?

A They are presented to Captain McCarthy.

Re-Direct Examination.

Q Do you happen to know what the market was for cotton in Savannah at that time, on March 19th, 1925? Or what kind of cotton was this, middling cotton?

A Middling cotton was reported at about 25 or 26c.

Q Do you know how many pounds of cotton there was in these one hundred and ten bales? Can you give us that?

A The 110 bales of cotton were stated to weigh 54,570 pounds.

Q Do you know whether the market on that day or occasion was better in Charleston or Savannah? Which was the better market, do you know?

A I couldn't say positively.

57 Q Tell the jury the balance of this telephone conversation that Mr. Hunter inquired of you? Go into the whole conversation now, please, the communication you had with Mr. Moyland by telephone before the visit to you?

Court:

Were there more than one conversation?

A Yes, sir, three conversations.

Court:

The only conversation, as I understand, that was inquired about over the telephone was the one about midday.

Q How many conversations with him you have that day?

A Three conversations.

Court:

That does not open the door to the other conversations.

Q How close together in point of time were they?

A About a half hour apart.

Q Do you recall the conversation with Mr. Moyland about mid-day, the one that took place about mid-day?

A Yes, sir.

Q Is that the one you are about to testify to?

A I was going to testify from the first conversation right on.

Court:

Was there any other part of the conversation, other than the notification to you that there was a forgery?

A Yes, sir.

Court:

Now, whatever else occurred in that conversation you may repeat.

Q Don't confuse the three now?

A This was the third conversation I had with Mr. Moyland regarding this cotton. May I explain anything regarding the two previous conversations that led to this third conversation?

Q No, sir.

A Mr. Moyland promised to call me on this particular occasion and he failed to do it and I called him, and I asked him if he had located the cars yet, and he

said he had been notified by Charleston that there was something wrong, apparently the cotton had not originated in Charleston, that it was checked out, but apparently there was a forgery involved and that Mr. MacDonnell was gone.

Q When you called him up on that occasion, why you call him up, to ask if he checked the cars?

Court:

That apparently will carry him into some previous conversation, he has already said Mr. Moyland agreed to call him.

Plaintiff:

All right, sir.

Re-Cross Examination.

Q I understood you to say that this was middling cotton?

A This cotton, no, sir; I didn't say that.

Q You don't know what it was?

A I had no way to tell.

Court:

It was not anything.

Q You inadvertently referred to middling cotton just now.

A I was asked the question as to what was the price of middling cotton in Savannah on March 19th, 1925. Middling cotton is on the basis on which we work in the cotton business.

Court:

You don't know if this was represented as being middling cotton?

59 A. No, sir.

(Re-Cross Continued.)

Q. What are the freight charges from Charleston, S. C., to Savannah, Ga., on 53,000 lbs. of cotton?

A. I couldn't tell you.

Q. They are considerable, are they not?

A. I couldn't answer that.

Q. You spoke of Mr. Reckling, he was a representative of the Gleason Cotton Co.?

A. He was at that time.

Q. And not of the Seaboard Air Line Railway?

A. No, sir.

Q. Now, Mr. Doolan, you spoke of this conference at one o'clock on the 20th with Mr. Moyland and Mr. Glaiber?

A. Yes, sir.

Q. And you say that he admitted that he then knew who had committed these other short comings?

A. We discussed things generally and Mr. Glaiber and Mr. Moyland confirmed they had suspicions of other wrong doings of Mr. MacDonnell and had enough evidence in hand to convince them he was the guilty party.

Q. On this date when he disappeared that they were in possession, I understand you to say, of sufficient evidence to connect him definitely with these other things that had happened?

A. I don't know about that part of it.

Court:

What did they say? Not what your opinion is as to what they could do, but was that the statement they made to you.

A They told us they had been checking up
60 on Mr. MacDonnell's records in previous cases and had enough evidence to convince them that he was the guilty party. I don't say that he was the guilty party to this—

Court:
Never mind, that is all right.

Q That was on the 20th of March?
A Yes, sir.
Q They told you they knew enough?
A They had already known enough. They had previously enough evidence is what I believe they said.
Q Didn't they tell you they had been investigating?
A They claimed they had some special agent here, I think, and that they had accumulated enough evidence to convince them he was the man.
Q Coupled with his disappearance?
A I don't know if that was a feature of it.
Q Didn't you say in your first testimony that they told you of this disappearance and this forgery, and that all the facts pointed to his connection with these other matters?
A I suppose the Secretary can read—

Court:
Just answer the question, as far as you can recollect?

A That they were convinced on the 20th he was the man.
Q They were in your office on the 18th, were they not?
A On the 18th? Not to my knowledge.
Q Investigating the irregularities?
A Not to my knowledge.

61 Re-Direct Examination.

Q. Was asything said about arresting him or not arresting him, that you recall? I am referring to Mr. MacDonnell?

A. I believe that I mentioned to him when they admitted to us, whether they had enough evidence on Mr. MacDonnell to assure them he was the wrong doer there, why they didn't keep the special agent on his trail to keep that from going on.

Q. What date?

A. On the 20th that they had enough evidence to convince them that McDonnell was the guilty party, and I asked them why they let him get away if they thought he was the guilty man, and I think their reply was that the special agent had the matter in hand.

Witness excused.

JOHN McLOGLIN, a witness called by the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Q. What is your name?

A. John McLoglin.

Q. Where were you employed on the 19th day of March, 1925?

A. At the John W. Gleason Cotton Company as bookkeeper.

Q. And are you still with them?

A. Yes, sir.

Q. You are?

A. Yes, sir.

Q. Did you ever see that paper before?

A. Yes, sir.

62 Q. When?

A. On March 19th, 1925.

Q. What connection did you have with it on that date?

A. I checked this draft.

Q. How do you mean checked it?

A. I checked it for payment. It came in due course from the bank with other drafts and I checked it against the records to see what it covered, and found there were 110 bales of cotton shipped against it.

Q. What do you do after you checked a draft?

A. Then I turn it over to the Cashier for payment.

Q. What do you do when you check it over?

A. To see that it is properly covered by a shipment of cotton.

Q. How long have you been in the cotton business?

A. For twenty five years.

Q. Do you pay drafts without finding out if the cotton is here?

A. No, sir. We knew in this case it had been received; we found out from the railroad the cotton was here.

Q. And you passed the draft to Mr. McCarthy for payment?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

63 Cross Examination.

Q. This draft came in as a separate item?

A. I don't recollect. It came to the Cashier, if it did. It has was handed to me with the other drafts. You see that probably we may have forty or fifty drafts in one day.

Q. You are speaking now of what the usual custom is? Didn't that draft come in there that day as a separate item?

A. No, sir; I don't know.

Q. You are uncertain whether it came in with the others?

A. Yes, sir; I am.

Q. Now, did Mr. Usina see you when he came in with the draft?

A. No, sir.

Q. He did not?

A. No, sir; he did not.

Q. How long have you been in the cotton business?

A. About twenty five years.

Q. Is it unusual for cotton to be shipped from the port of Charleston, S. C., to Savannah?

A. Well, we have heard of shipments that way.

Q. You recall any?

A. I couldn't specially recall any.

Q. Do you know of a single party in Charleston that you ever bought cotton from before, and advanced money to on the cotton?

A. I cannot recall.

Q. It is unusual?

A. I couldn't tell you of any business coming that way.

Q. Almost remarkable?

61 A. It depends on conditions. If we had a better market, a more active market than Charleston we might get some shipments from Charleston.

Q. As a matter of fact, that had not been the case to your knowledge?

A. I don't know. The market was better here at that time, as I understand, and that is how this shipment happened to be made here.

Q You don't know that?

A Only from hearsay, that is all.

Q Did you or not know—or I believe you say you didn't know about it at the time. That is all.

Re Direct Examination.

Q Did you see the bill of lading?

A Yes, sir; the bill of lading was handed to me, I imagine, they all come to me with the drafts.

Q You remember particularly about this bill of lading?

A Yes, sir.

Q Was it indorsed?

A Yes, sir; must have been indorsed, wouldn't have paid the draft unless it was indorsed.

Defendant:

If it please the Court, I object to the witness testifying to the general conduct, or what he suspicioned or what he usually does.

Plaintiff:

I will remove the objectionable feature, if your Honor please.

65 Q I don't want you to testify to the general custom, but what you know of this particular draft. You recall anything about that draft in that respect, whether it was indorsed or not?

A I would not have passed it for payment if it had not been indorsed.

Court:

Have you any affirmative knowledge of your own, irrespective of your custom, about this bill of lading? Do you know in whose name it was?

A Yes, sir.

Q. You know that by reference to the draft?

A. Yes, sir.

Q. You have any knowledge irrespective of the custom as to whether it was indorsed?

A. I know it was indorsed.

Court:

I am inclined to think anyhow it would be competent for him to testify as to his custom, otherwise large business affairs never could be carried out. No man would recollect such things definitely.

Re-Cross Examination.

Q. It is a matter of custom and you don't remember in this particular circumstance what you did, how the draft came in, whether it came in with any other drafts, or whether it came in as a separate item, or whether it was or not indorsed?

A. We handle as many as 100 drafts a day sometimes.

Court:

He asked you had you any recollection independent of your custom that that was indorsed?

66 A. I would say that I did have, because it was a special case.

Q. When you entered an approval on the paper for check to be issued, and if the draft covering the bill of lading required the paper to be indorsed, would you entered approval for check to be issued unless it had been indorsed?

A. No, sir, I would not.

(Re-Cross Continued.)

Q. Why was it a special and unusual case?

A. It was a large draft and we had inquired about the cotton to find out if the cotton was here. The only thing I had in mind at all was if the cotton was all right, and apparently the amount drawn on it was all right. It was a question of whether the cotton was damaged or not.

Q. Is it unusual for the John W. Gleason Cotton Co. to pay such drafts?

A. No, sir; not at all.

Q. It was unusual in that it was a large amount?

A. Yes, sir.

Q. What other unusual features were there?

A. An unusual feature was that we didn't know Mr. J. A. Tillman and we wanted to get hold of the cotton before paying the draft.

Q. That was the unusual part of it?

A. Yes, sir.

Q. You knew at the time that the draft was honored that you did not know Mr. Tillman or anything about him?

A. That is true, other than the recommendation we got from Mr. MacDonnell, that is all.

67 Q. You didn't know whether Mr. Tillman was in the cotton business or not?

A. Only from what Mr. MacDonnell told us.

Q. You didn't know whether or not he had any bank connection in Charleston?

A. No, sir; I didn't know that.

Q. It was also unusual, was it not for a shipment of cotton to be moving from Charleston, S. C., to Savannah?

Court:

I think we have gone over that feature.

Defendant:

Yes, sir; I have asked that question before.

Court:

Then don't lets go over it again, if you please.

Witness excused.

JEREMIAH F. McCARTHY, a witness called by the Plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Q What is your name?

A. Jeremiah F. McCarthy.

Q What was your position on the 19th day of March, 1925? What was your employment?

A How was I employed?

Q Yes?

A. With the John W. Gleason Cotton Company.

Q And are you still with them?

A Yes, sir; still with them.

Q In what capacity were you working there in March, 1925?

A. As Cashier.

Q Did you ever see this draft before, this paper before?

A. Yes, sir.

68 Q When did you first see it?

A. It was presented by the runner for the Bank.

Q. To whom?

A. To me.

Q. What did you do with it?

A. I set it aside for a while until the drafts from the other banks came in, then I would assort them, passing them if they had bills of lading attached, just as they had on this one.

Q. Whose hand writing is that "55,000" in?

A. That is mine.

Q. Where did you get those figures from?

A. From the bill of lading.

Q. Who saw the draft next?

A. The drafts are assorted alphabetically for the convenience of the bookkeeper, regardless of the bank through which the draft comes. They are arranged that way, they are fastened together and then passed up to Mr. McLoglin, together with the bills of lading.

Q. What did he do with that draft after it was passed to him?

A. Then they have a discussion as to the payment of these drafts; they are very careful in handling them. There are no less than three men that examine every one of these drafts.

Q. Did this draft get back to you?

A. It gets back to me when it has the blue
69 pencil check mark on it to pay.

Q. And you paid it?

A. I paid it.

Q. When did you first see that?

A. This includes that draft and one other draft that came in from the same bank.

Q. Who drew the check?

A. I filled it in and the attorney signed it.

Q. Who was the attorney?

A. W. M. Doherty.

Q. The checks are signed in blank and you fill them in?

A. Yes, sir.

Q. That was to cover this draft?

A. Yes, sir; that and one other that came in with it. (Referring to check of March 19th, 1925, to the Citizens & Southern Bank, for $10,132.90, signed by the John W. Gleason Cotton Co.)

Q. The one draft was from the same bank?

A. Yes, sir; from the same bank.

Cross Examination.

Q. Was this with other drafts that came in that day?

A. There may have been quite a number. The Savannah Bank and Trust Company and the other banks present their drafts.

Q. You don't know whether there were or not?

A. If I had thought of this question being asked I would have been prepared to have answered it promptly.

Q. You don't know whether this item came
70 in as a special item, this draft came in as a special item by itself, or whether it came in in the morning with the other drafts?

A. I know it came in with other drafts from that bank.

Q. As a matter of fact didn't Mr. Usina of the Citizens & Southern Bank bring this draft from the Citizens & Southern Bank to the John W. Gleason Cotton Company as a special item?

A. No, sir; I don't think he did, because he brought to me afterwards a letter—

Plaintiff:

Don't state the contents of the letter.

Q The draft was already in the office, and they had later brought you a letter?

A After they had brought me the letter.

Q But before the draft was paid?

A But before the draft was paid, but had not been passed on for payment?

Q But had not been delivered? Is that correct?

A What had not been delivered?

Q The draft or check to the Citizens & Southern Bank?

A The check in payment had not been delivered yet.

Q Is that the letter, sir, that they had brought you?

A Yes, sir; I think it is.

Q You read that letter at the time?

A I read it.

Q You compared the signature card with the signature on the draft?

A Yes, sir.

Q And you then paid it?

71 A I then paid it.

Q Now, Mr. McCarthy, have you any customers that ship you cotton from Charleston, S. C.?

A None that I recall.

Q Was this transaction an unusual transaction?

A No, sir; I don't think so. As far as I can recall the John Flannery Company used to get shipments from there, or use to file contracts over here.

Q You have never gotten one before?

A I don't understand you.

Q You have never seen that before, shipment to a factor here from Charleston of cotton?

A. I know there have been shipments from Charleston, but I don't recall them.

Q. But the shipments you refer to have been to boats?

A. By boats?

Q. Boats or ships?

A. I don't recall that.

Q. You don't know whether they were or not?

A. No, sir; I don't recall. I could refer to the books and find out.

Q. You don't know of any customers of the John W. Gleason Cotton Company in Charleston?

A. I don't know as a fact that this is the only cotton shipment that the John W. Gleason Cotton Company got from Charleston.

Q. Didn't it occur to you, Mr. McCarthy, as being an extraordinary thing for a man to handle
72 110 bales of cotton and draw a draft through a bank where he was not known for $10,000?

A. Well, no. Many customers ship to us and we don't know them.

Court:

He means where that was not known to the bank, not to you?

A. We wouldn't know whether he was known to the bank or not.

Q. You did know in this particular case, did you not, sir?

A. After the receipt of that letter it looked that way.

Q. You did know?

A. Did know what?

Q. That the Bank of Charleston did not know J. A. Tillman?

A. No more than that letter implies.

Q. If he had gone to a bank and drawn a draft through them, put it in for collection, an item of $10,000, in a place where he was supposed to live, and he came to that bank absolutely unidentified, is not that a most unusual business transaction?

A. I don't think so. If it was backed up by a bill of lading and that bill of lading, or statement from us, that we held it, and the assurance from the Railroad Company that the cotton was there in the yard against that bill of lading, we would have paid it.

Q. I didn't ask you that—I said isn't it an unusual business transaction?

A. I cannot admit that.

Q. For a man to handle a $10,000 item through a bank, that did not know him in the place where

73 he was supposed to live?

Q. It is the principle, it is not the question of the amount, it is the principle of paying the draft without identification?

A. We have a system there that that draft, and others that come in, have to go through the scrutiny of three men in the office before it is finally approved for payment.

Court:

I don't think you understand the question. The question is whether or not it is an unusual transaction for a $10,000 item of this kind to be handled through a bank where the drawer of the draft is not known to the bank?

A. It is not a question of the $10,000, you misapply that, it is a question of payment drafts for men we don't know.

Court:

He has asked you whether or not it is an unusual transaction for a person who is not known to a bank in Charleston, to handle this kind of an item, where he is unknown to the Bank of Charleston?

A. But this information from Charleston—

Q. Would you mind answering that question? That is what he is entitled to have you answer? Was that or not an unusual transaction?

A. I cannot admit it.

(Cross Continued.)

Defendant:

I wish to take the liberty, your Honor, at this time to offer the letter referred to in evidence, so the Court and jury may know what this is about. May I offer it at this time?

74 Plaintiff:

The Court please, I don't think this is the time for the defendant to offer it.

Court:

You have a right, I take it, to do this: You may ask him, put you hypothetical question, involving the language of that letter in it.

Q. Do you not consider, or is it not an unusual business proposition for a man to present in his own home town a draft on a bank for $10,000 for collection, and have that bank in forwarding that item for collection send a special letter, in which they say that Mr. Tillman has come to us unidentified "and we ask that you credit our account with the enclosed only upon actual final pay-

ment"? Is it not an unusual business transaction for a man to handle such a large item through a bank in his own home town, where he is unidentified, unknown?

A. No, sir; I cannot say it is. They wouldn't cash a draft for a man in Charleston unless they knew him, but they would collect it for him, depending on us to report promptly on the payment of the draft, when the money would be turned over to him.

Re Direct Examination.

Q. Did you pay that draft upon the identification of Tillman through some other person?

A. It didn't give me much concern.

Q. Why did you pay the draft?

A. Because it was passed on by three others, who were assured that the cotton was in the yard and they would be safe in paying the draft.

Q. What is that "C" there?

75 A. I don't know, I think it is the bank's—

Q. Never mind, if you don't know.

Witness excused.

Plaintiff

We wish to offer in evidence at this time these two papers, first the draft, as follows:

"$10,000 Charleston, S. C., March 18, 1925.

At sight pay to the order of J. A. Tillman Ten Thousand and 00/100 Dollars.

Value received and charge to account of

To John W. Gleason Cotton Company,

No. ..... Savannah, Ga.

J. A. TILLMAN."

(In the top corner of the draft in red ink is "110 — 53570," and in ink over the word Charleston is a "C;" stamped across the draft "B. L. Attached," and "Bank of Charleston, N. B. A., Charleston, S. C.;" and "No Pro, 38 2); and with the paid stamp "John W. Gleason Cotton Company, Paid, Mar. 19, Savannah, Ga." indorsed by "J. A. Tillman," with the paid stamp of the Citizens & Southern Bank on the back of draft, dated March 19, 1925.

We offer that as our

EXHIBIT No. 2.

We also offer check dated March 19th, 1925, as follows:

76 "Savannah, Ga., March 19th, 1925.
No. 17344
38 2 The Citizens and Southern Bank. 38 2

Pay to the order of The Citizens & Southern Bank $10,132.90. Ten Thousand One Hundred Thirty Three Dollars and Ninety Cents.

JOHN W. GLEASON COTTON CO.,
By W. M. DOHERTY,
Attorney."

(Printed across the side of check "John W. Gleason Cotton Co., Cotton Factors, with a perforated stamp of "paid" through the body of check.)

We offer that as our

EXHIBIT No. 3.

T. R. BECKLING, a witness called by the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q What is your name?
A T. R. Beckling.
Q Mr. Beckling, where were you working on the 19th day of March, 1925?
A With the John W. Gleason Cotton Co.
Q In what capacity were you working with them?
A Junior clerk; I had charge of entering all the bills of lading.
Q What company did the John W. Gleason Cotton Company succeed?
A The John Flannery Company.
Q How long have they been in business?
A I don't know.
Q How long were you with them?
A Ten months.
Q What is that book I hand you?
A Advance book.
Q Who kept it?
A I did.
Q Whose hand writing is that on the inside?
A Mine.
Q Made when?
A March 19th.
Q Made from what?
A From bills of lading.
Q What has become of that bill of lading?
A It was surrendered to the Seaboard Air Line.

Q. When did you see it last?

A. On March 19th, 1925, about one o'clock.

Q. You had it in your possession?

(The witness at this point became nauseated and had to be excused, but was recalled later, counsel agreeing to go ahead with other witnesses.)

EDWARD JOHNSON, a witness called by the Plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Q. What is your name?

A. Edward Johnson.

Q. Where do you work?

A. With the John W. Gleason Cotton Co.

Q. How long have you been with them?

A. Four years.

78 Q. You were there on March 19th, 1925?

A. Yes, sir.

Q. Did you know a gentleman by the name of Mr. MacDonnell with the Seaboard Air Line Railroad across the river there?

A. Yes, sir.

Q. Did you see him on March 19th, 1925?

A. Yes, sir.

Q. Where?

A. Across the river to the Seaboard Air Line Railway Company's office.

Q. That is the usual place of business of the Seaboard Air Line Railway?

A. Yes, sir.

Q. His office was over there?

A. Yes, sir.

Q. What time did you see him?

A. I think I saw him five minutes after two o'clock.

Q. For what purpose did you go over there to the Seaboard Air Line's office?

A. I carried a bill of lading over there for Mr. Reckling.

Q. This young man who has just left the stand?

A. Yes, sir.

Q. He gave it to you where?

A. At the office of The John W. Gleason Cotton Co.

Q. What became of the bill of lading?

A. Mr. MacDonnell, he signed for it and took the bill of lading and I brought the receipt back.

79 Q. What you do with the bill of lading?

A. He signed the receipt and kept the bill of lading.

Q. Is this the receipt he signed?

A. Yes, sir.

Q. Who signed that?

A. Mr. MacDonnell.

Q. You saw him sign it?

A. Yes, sir.

Q. Over in the office of the Seaboard Air Line Railway?

A. Yes, sir.

Q. And he kept the bill of lading?

A. Yes, sir.

Witness Excused.

JOHN W. GLEASON, a witness called by the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Q You are in business in Savannah?
A Yes, sir.
Q In what kind of business?
A Cotton factors.
Q What is your firm name?
A The John W. Gleason Cotton Company.
Q Is that the way you do business?
A Yes, sir.
Q Who were you with before that?
A With the John Flannery Company.
Q How long with them?
A Over forty years.
Q How long has the John W. Gleason Cotton Company been in existence?
A Since 1918. I have been in that business altogether about forty-three years.
Q You are familiar with the cotton business in Savannah?
A I think so.
Q Some question has been asked, Mr. Gleason, about the unusualness of a shipment of cotton to Savannah from the port of Charleston, to the port of Savannah, what do you say about that?
A I wouldn't say it was so very unusual.
Q Have you known of other such instances?
A Yes, sir.
Q Can you give us any reason why cotton wouldn't be shipped from Charleston to Savannah, both being ports?

A. The main reason for shipping it I would say would be the difference in price at Savannah at various times for cotton.

Q. You know what became of the original of that paper?

A. It was mailed—I have never see the original.

Q. Is the address given absolutely?

A. Yes, sir.

Q. Has it ever come back to you?

A. No, sir.

Q. Is this a correct copy of it?

A. Yes, sir.

81 Defendant:

If the Court please, didn't he say he had never seen the original?

A. I said the return of the original.

(Direct: Q. Who wrote the original?

A. I did.

Plaintiff:

Is there any objection to the introduction of this letter?

Defendant:

No objection.

Q. Where did you get the address on this letter from?

A. From Mr. MacDonnell.

Q. He gave you this address?

A. Yes, sir.

Plaintiff:

If the Court please, we will introduce the letter at this time as our

EXHIBIT No. 4,

reading as follows: It is a copy of the original letter.

"3 17 25.

"Mr. J. A. Tillman,

% New Charleston Theatre,

Charleston, S. C.

Dear Sir:

We are advised by our mutual friend, Mr. MacDonnell, that you have a lot of cotton which you may consider assigning to Savannah, and we are writing to solicit the handling of this cotton, promising in advance our best attention.

We have a good demand for cotton at all times here, and we are able to obtain full prices.

We would be willing to make liberal advances on the cotton, and hold for your later instructions.

While the market is quiet at this writing at about 25 1 4c, we look for better prices in the near future.

"Hoping to be favored with the handling of your cotton, and with our best wishes, we are,

Very truly yours,

JOHN W. GLEASON COTTON COMPANY,

Per ....."

Q. Did you sign that letter?

A. Yes, sir; I signed it.

Q. This quotation of 25 1 4c, does that correctly state the market at that time?

A. Yes, sir.

Q. Do you recall whether the market was higher or lower in Savannah or Charleston at that time?

A. I don't recall it.

Q. On what basis were you offering 25 1 4c?

A. On middling cotton.

Q. There is some talk about the large amount of this draft, $10,000, being advance on this amount of cotton, and I ask you what price was that advance figured on?

A. On a basis of 18c.

Q. So you had sufficient margin?

A. Yes, sir; an unusual margin.

Q. When did you find out that this cotton had not been delivered at your warehouse?

A. The morning of the 19th. I think it was the morning of the 19th, or the morning of the 20th.

Q. After the draft had been paid or before?

83 A. After it was paid.

Q. I ask you when you first found out the cotton was not delivered? Let me refresh your recollection? Look at the date of this check from your company?

A. It was the day afterwards, it was the 20th.

Q. That is the first time you ascertained the cotton was not here?

A. Yes, sir.

Q. Did you take the matter up with anyone representing the Seaboard Air Line Railway?

A. I didn't personally.

Q. Did anyone do so in your presence? Or never mind, if you didn't do so personally. Did you have any conversation with anyone over the telephone?

A. I did with Mr. Doolan.

Q. From your office?
A. Yes, sir.
Q. You communicated with him?
A. Yes, sir.

Cross Examination.

Q. Mr. Gleason, it would take considerable difference in the market value of cotton in Savannah and Charleston to more than make up the freight tax, would it not?
A. I don't know the freight rate, I am not familiar with the freight rate.
Q. You do not know the freight rate from here to Charleston?
A. I do not; that does not come under my head at all.

Q. Isn't it an unusual thing in business, in
84 your business experience, for a man to deposit for collection a ten thousand dollar item in a bank in his own home town, to which he comes absolutely unidentified?
A. I wouldn't say so. I think that it probably happens in other places.
Q. Isn't it unusual?
A. I wouldn't say so.
Q. That a man who as a rule has a sufficient financial reputation to own one hundred and ten bales of cotton, has he not usually banking connections?
A. I wouldn't know, I couldn't say.
Q. Does he not usually carry a bank account?
A. I couldn't say.
Q. You have had some business experience, have you not?
A. Yes, sir.

Q. Wouldn't you say that that was unusual, or would you say it was usual for a man to put in for collection an item of ten thousand dollars in his own home, where he was absolutely unknown?

A. I wouldn't say that was unusual.

Court:

Is there any evidence that Charleston was Tillman's home, that was his home, is there any such evidence?

Defendant:

If your Honor please, we are taking that, none but what he testified to, that was the evidence he gave. That his address was care of The New Charleston Theatre, Charleston, S. C.

Court:

The evidence before us is that the mail was to be addressed to this particular place in Charleston?

Defendant:

We are presuming, your Honor, that was his home, that that was where he was then living, as that was his evidence. The place he was then doing business I will say, instead of saying home.

A. I wouldn't know how to answer that; he might not be known to one bank but known to another bank.

Q. Isn't it unusual for a man to handle his business affairs through another bank rather than his own bank? Isn't it usual for a man to handle them through his own bank?

A. Yes, sir; it is usual for him to handle his business through his own bank.

Q. A bank at least where he is known, particularly for handling a large item, if it is not done it is unusual isn't it?

A. It might be.

Q. You knew, did you not, that he was unidentified?

A. I don't know.

Q. You are not sure that Mr. McCarthy ever took the trouble to show you that, are you?

A. No, sir.

Q. Mr. McCarthy may have entirely disregarded this notice that was brought to him by the Citizens & Southern Bank?

A. Yes, sir.

Q. You are not sure he brought it to anyone else's attention, are you?

A. No, sir.

Q. And he is your Cashier?

86 A. Yes, sir.

Q. In charge of keeping your funds?

A. Yes, sir.

Q. And you are not sure he took this precaution to bring this information to your attention?

A. No, sir.

Q. Now, did you ever know Mr. Tillman?

A. No, sir.

Q. Ever hear of him?

A. No, sir; only through Mr. MacDonnell.

Q. Ever hear of him as a cotton dealer?

A. Only through Mr. MacDonnell.

Q. You didn't investigate his financial standing?

A. No, sir.

Q. You didn't even know he owned this cotton, if there was any cotton?

A. I did not.

Q Was Mr. MacDonnell a man of business affairs who you would have credited with $10,000?

A I didn't know I credited him.

Q I know, you say you acted through his introduction?

A Yes, sir; that this man had the cotton.

Q Even if there had been cotton you were not in a position to know whether Mr. Tillman owned that cotton or not, were you?

A Only from the statement of Mr. MacDonnell that Mr. Tillman had the cotton, and then the bill of lading came signed by Tillman.

87 Q If there had been any actual cotton, it could have been "dogs" for all you knew about it when you paid that draft?

A Yes, sir.

Q And if it had been it would have been worth far less than the money you advanced him?

A I don't think it would have been worth less than 18c. I don't think any cotton involved at that time would be worth less than 18c.

Q Dog tails would be?

A Dog tails would be what we call below ordinary cotton. We didn't think we were taking any chances on the character of the cotton.

Q Suppose it had been filled with bricks?

A I didn't know at that time.

Q You didn't sample the cotton?

A No, sir.

Q Or had not made any effort to sample it?

A No, sir.

Q Isn't it customary that where you deal with a new customer, one who you don't know, to inspect or to sample the cotton that they send you before making advances?

A. No, sir; it is not customary.

Q. You just advance him on the strength of his statement so much a bale without regard to what might be in these bales?

A. When we feel we have a proper margin in the cotton there is not much concern about the grade after that.

Q. Don't you investigate the financial status of a party you don't know?

A. We didn't think it necessary in this case.

Q. Why did you think that Mr. Tillman—or why did you make an exception in this case?

A. On account of having the bill of lading, and were previously advised that the cotton was coming in, that Mr. MacDonnell had solicited the shipment of cotton for us, and we didn't hesitate with all that information to pay the draft.

Q. You acted entirely you say on the representations that Mr. MacDonnell made to you in this matter?

A. The representation that the cotton was in the Railroad's hands, waiting for the bill of lading.

Re-Direct Examination.

Q. You were not concerned then with the integrity of Mr. J. A. Tillman?

A. No, sir.

Re-Cross Examination.

Q. You didn't care then who was Mr. Tillman, or whether there was one?

A. We were depending on the bill of lading. We were told previously there was such a man by Mr. MacDonnell, and that he was going to ship this cotton.

Q. And aside from that representation you made no effort to ascertain anything further?

A. I think that was enough.

89 Court:

He has already gone over that, don't let's go over it again.

Witness Excused.

T. R. RECKLING, recalled to stand, direct examination continued:

Q. I believe we had gotten to the point where the bill of lading came to you, and I asked you what time did you get it?

A. I suppose I got it about eleven thirty, sir.

Q. What did you do with it?

A. I made out a receipt for it.

Q. After entering it in the book?

A. Yes, sir; I made out a receipt for it in duplicate form and sent the bill of lading over to the Seaboard Air Line Railroad.

Q. Is that the receipt I hand you?

A. Yes, sir.

Q. Who did you send the receipt by?

A. By the porter.

Q. Edward Johnson?

A. Yes, sir.

Q. That boy sitting over there?

A. Yes, sir.

Q. Who brought you back that paper, that receipt?

A. That same boy brought it back to me.

Q. Brought it back on the same day?

A. Yes, sir.

Witness Excused.

90 The following entry was identified by the witness, T. R. Reckling, from the book handed him marked "Transfer, M-Z", being a loose leave ledger or book:

"The John Flannery Company, Savannah, Georgia, J. A. Tillman, Charleston, S. C.

Date	Marks	Upland	Bales	Weight	Date
					Mar.
1925	JAT	110	110	53,570	18

O N Sal. Mar. 19, 1925."

Plaintiff:
We rest.

Court adjourned at this point until 9:30 o'clock, Feb. 24th, 1927.

Court convened at 9:30 a. m., Feb. 24th, 1927.

Defendant:
May it please the Court, we have here an agreement as to certain facts occurring in Charleston, S. C., consented to by the Plaintiff, which we will present to the Jury at this time.

Court:
Very well, sir.

Defendant:
Gentlemen of the Jury, I will read this to you as our

EXHIBIT No. 1

(Title Omitted).

It is hereby stipulated and agreed between the parties in this case that the following shall be admitted
91 in evidence on the trial of this case and at every trial and hearing thereof and shall be taken and accepted as being a true statement of facts and events occurring in Charleston, S. C.

On March 18, 1925 George D. MacDonnell went to Charleston, South Carolina, where he presented himself under the name of J. A. Tillman, at the Bank of Charleston and drew on the John W. Gleason Cotton Company of Savannah in the name of said Tillman for $10,000 with bill of lading attached purporting to cover 110 bales of cotton marked J. A. T. received on March 18, 1925, at Charleston to be transported by the Seaboard Air Line Railway to Savannah, order said Tillman, notify John W. Gleason Cotton Company. The bill of lading thus offered to MacDonnell the indorsement on same, and the draft drawn by him in the name of said Tillman were all forged by him, the said MacDonnell. The name J. A. Tillman so used by him was a fictitious name. As a matter of fact there was no such shipment originating at Charleston. No such 110 bales or any part of same ever existed or was ever delivered to the Seaboard Air Line Railway Company, to said Tillman, or said MacDonnell or by anyone for transportation to Savannah to the order of J. A. Tillman and to notify John W. Gleason Cotton Company.

The Bank of Charleston did not discount said
92 draft on presentation nor advance any money upon it, nor have any lien on the said draft or its proceeds, but handled it simply for collection.

After the draft was paid in Savannah and the funds transmitted to the Bank of Charleston in Charleston by mail, arriving at the opening of business on the morning of March 20, 1925, said MacDonnell presented himself at the said bank during the morning of that day (witness uncertain as to hour), still masquerading under the name of J. A. Tillman and collected the $10,000 with which he decamped.

The Bank officials, Mr. A. R. LaCoste, Vice President, and Mr. R. G. Simmons, Teller, who handled this transaction, had received no information of any kind relative to the bill of lading from the Seaboard Air Line Railway Company, its agents, or employees in Charleston or elsewhere, but relied solely upon the representations of MacDonnell masquerading as Tillman in receiving same, forwarding it for collection and paying out the proceeds.

George D. MacDonnell employed by the Seaboard in Savannah then had no connection of any kind with the Seaboard Air Line Railway Company at Charleston. He had no authority to issue bills of lading in Charleston. The forged bill of lading was not issued by MacDonnell in or about the offices of the Seaboard Air Line Railway Company in Charleston. The records of the
93 offices of the Railroad in and about Charleston contain no record of any kind of this purported shipment.

The Charleston way bill references given by MacDonnell were fictitious, the actual way bills bearing those numbers as of record in the Charleston Office of the Railroad covered entirely different shipments, none of which were shipped to Tillman or MacDonnell, none of which were to Gleason Cotton Company or notify Gleason Cotton Company, and none of which covered cotton.

By agreeing to the foregoing statement of facts, plaintiff does not agree to any legal conclusions therefrom, nor shall plaintiff be in anywise restricted in urging, by way of estoppel, matters inconsistent therewith.

This 11th day of February, 1927.

HARTRIDGE, WRIGHT AND BRENNAN,
Attorneys for Plaintiff.
ANDERSON, CANN AND CANN,
CONNERAT & HUNTER,
Attorneys for Defendant."

C H USINA, a witness called by the defendant, being first duly sworn, testified as follows:

Direct Examination.

Q What is your name?

A C H Usina.

Q Mr Usina, by whom are you employed, sir?

94 A I am employed in the credit department of the Citizens and Southern Bank.

Q Were you so employed on March 18th, 1925?

A Yes, sir.

Q On that occasion or at that time did you have occasion to handle that letter, sir?

A Yes, sir.

Q What did you do with it, sir? How did you get it and what did you do with it?

A This letter was received with a draft for $10,000, and the bank works the drafts and letters separately.

because the drafts have to be handled during banking hours or before two o'clock, and letters of this kind can be handled after two o'clock, and it is not as important as the draft, which is given first consideration. The draft enclosed in this letter was sent to the John W. Gleason Cotton Company by our usual runner, the same boy that delivers these other drafts, and later in the day the teller turned this letter over to me, and I had a signature card attached to it, said to be that of J. A. Tillman, and he told me to carry it over to the J. A. Gleason Cotton Company and have the signature identified, and I did that and presented it to Captain Jeriminah F. McCarthy, Cashier of the John W. Gleason Cotton Company, and he read the letter through and compared the signature with some record in his drawer, just below his desk, and stated to me "it must be all right, here is a check to pay for it."

95 Q. Please repeat that?

A. He stated "it must be all right and here is a check to pay for it," and gave me a check for $10,000. Instead of delivering the check to the bank in the usual course he gave it to me and I took it to the bank. That was my only connection with it.

Q. Do you remember whether that check was for just that item, or for other items?

A. The check was in excess of $10,000. I assume it covered this item and some additional items. It was in excess of $10,000, it covered our drafts for that day.

Q. Including this item?

A. Yes, sir.

Defendant:

If it please the Court, we wish to tender this letter in evidence.

Plaintiff:

We have no objection, your Honor.

"Bank of Charleston.

Charleston, S. C., March 18, 1925.

Citizens & Southern Bank,

Savannah, Ga.,

Dear Sirs:

You will find enclosed our collection No. 16058 consisting of a draft on John W. Gleason Cotton Company of your city drawn by J. A. Tillman for $10,000 with order notify lading attached covering 100 bales of cotton.

"Mr. Tillman has come to us unidentified,
96 and we ask that you credit our account with the enclosed only upon actual final payment.

We are enclosing a specimen signature of Mr. Tillman the drawer of the draft in question and ask that if possible you have same identified for us.

Yours very truly,

A. R. LACOSTE,

ARL:O Vice President."

In pencil on bottom of letter:

"O. K. C. H. USINA."

We wish to have that marked as our

EXHIBIT No. 2.

Cross Examination.

Q. Mr. Using, what is this at the bottom here?

A. This is my signature.

Q. This is your signature?

A. Yes, sir.

Q. "C. H. Usina, O. K."?

A. I took it over to the office.

Q. What are these other markings here on it?

A. That has probably been done here in the Court.

Q. You know what this is?

A. No, sir; there were two copies furnished to Mr. Doolan of the John W. Gleason Cotton Company of this letter.

Q. You didn't leave any copy with Mr. Doolan or Mr. McCarthy at the John W. Gleason Cotton Company's office at the time you took this letter over there?

A. No, sir; I did not.

97 Q. Mr. Usina, you used the word "important", I didn't quite catch what you said, in answer to Captain Hunter's question, you didn't consider it important. What did you mean?

A. I meant that the draft has to be handled by two o'clock, the letter could be handled after two o'clock.

Q. In other words, you didn't consider the letter of special importance anyhow?

A. We considered it of sufficient importance to identify that signature for the Bank of Charleston.

Q. Did you see what Mr. McCarthy looked at when he opened his drawer?

A. No, sir.

Q. Did you see where the draft was?

A. No, sir; up to that time I had not seen the draft.

Q. You had never seen the draft?

A. No, sir.

Q. Never seen the draft yet.

A. Yes, sir.

Q. What is the special signature that the bank acknowledged?

A. Probably referred to the Bank of Charleston.

Q. You have not got that?

A. No, sir.

Q. Did you look yourself and see if that signature corresponded with the signature specially sent?

A. I do not handle these drafts; they were handled by the collecting teller, and he after the draft had been presented to the John W. Gleason Cotton Company asked me to take that letter over.

98

Q. Let me see if I have your idea right? It didn't make any difference to the bank whether the letter went with the draft or not, the primary concern was to collect the draft?

A. Yes, sir.

Q. You presented this at what time, to Cashier McCarthy? About one o'clock?

A. No, sir; I think it was before one o'clock; I dare say it was around noon.

Q. You think it was around noon?

A. Yes, sir.

Q. Now do you happen to know what time the draft went over there to the John W. Gleason Cotton Company?

A. They usually send them over between ten and eleven o'clock.

Q. You have a boy there just for the cotton trade?

A. Yes, sir.

Q. About how many cotton houses along there, fifteen or twenty?

A. Yes, sir.

Q. And the Citizens & Southern Bank is right around the corner from these cotton houses?

A. No, sir.

Q. But it wouldn't take a boy more than a half hour to cover the entire field?

A. Yes, sir.

Q The boy goes around and delivers the
99 draft and the people send the check to the bank?

A Yes, sir.

Q The boy doesn't call for the check?

A No, sir.

Q That is the check there that Mr. McCarthy gave you?

(Referring to check for $10,132.00 in evidence).

A Yes, sir.

Re-Direct Examination.

Q Mr. Usina, did you take this letter on your own account, or did someone in the bank send you with it?

A The collection teller instructed me to take it over there and have the signature verified.

Q That was out of the usual course?

A Yes, sir; I never seen that done before in my five years experience with the bank.

Q Do you or do you not ordinarily take the drafts around?

A No, sir; I do not take the drafts around.

Q Ordinarily do you go for them—for the checks?

A No, sir.

Q And as you say you didn't take this one of your own volition?

A No, sir.

Q You were instructed you say to do this, and it was about twelve o'clock when you went around there?

A Yes, sir.

Q And that was before the close of the banking hours?

A Yes, sir.

Q Of course this was also before the check was presented for payment?

100 Court:

He has already testified about that.

Witness Excused.

I. M. SUMNER, a witness called by the Defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Anderson:

Q Mr. Sumner, what was your business in March, 1925?

A I was special agent for the Seaboard Air Line Railway Company.

Q What did you do as Special Agent, what were your duties as Special Agent? What do you mean by that?

A My duties consisted of various things, and among other things tracing lost and strayed shipments and making special investigations, investigating claims.

Q Your department then is an investigating department, as I understand it?

A Yes, sir.

Q To what extent, if any, may it be considered that your department filled the service of a detective agency?

A Yes, sir; it did to some extent.

Q During March, 1925, on or about that time, did you have occasion to investigate any discrepencies here in Savannah in cotton?

A Yes, sir; March 18th, 1925.

Q. What were you investigating then?

A. I was investigatering the loss of three bales of cotton from Scotia, S. C.

Q. To what place was that cotton supposed
101 to have gone?

A. The cotton was consigned to Middleton & Peterson, Savannah, Ga.

Q. Had they received that cotton?

A. They had not, as they stated.

Q. Was it your duty to try to locate it?

A. Yes, sir.

Q. What did you do here on March 18th, 1925, with reference to that investigation of that discrepency of that three bales of cotton?

A. On March 18th, 1925, some time during the day, I called on Middleton & Peterson to confirm that report that they had not received the cotton, and I was told by one of the members of that firm, either Mr. Peterson or Mr. Middleton there, that the cotton was still short and they had not received it. I then went to the Island and to Cotton Block and made a thorough investigation there. However, I confirmed the seal record of the car that moved this cotton from Scotia, S. C., into Savannah and on to the Island, being the same seal as we applied at Scotia, the car reaching the Island under this seal, and beginning with that I started this investigation on the Island.

Q. Did you find out anything on the Island about that three bales?

A. I found that the three bales of cotton had arrived O. K. and had been loaded apparently in error in an L&N car and went to the Waller Warehouse Company through mistake.

102 Court:

He said apparently. That is an opinion. As I understand, this gentleman is freely presenting his deductions from certain facts.

Defendant:

I don't want you to give deductions, I want you to state what you found.

Court:

You don't know anything about it yourself?

A. No, sir; this was my investigation.

Court:

That statement represents his conclusions, doesn't it, what some one else told him? I don't know the import of the testimony, it may be important on that particular matter, but I hardly think it would be competent for him to conclude it was loaded in that car, if that is the special thing to establish. He said he didn't see it.

Plaintiff:

We wish to call your Honor's attention to the fact that his testimony is hearsay anyhow.

Court:

That is my thought. I don't know what the import of the testimony is. What ever he knows is all right, but not simply to state his conclusions, if the evidence is important. How does he know it got in the car?

Defendant:

I don't think that important that he go into that.

Court:

Suppose you omit it then.

Plaintiff:

If the Court please, the statement that the car was sealed is necessarily hearsay too, the whole thing was based on hearsay. I don't want him to think we are consenting to it. We simply didn't object.

Q. To what extent was your investigation based upon what you found from the official record?

103 Plaintiff:

If the Court please, I object to that, on the ground that the official record would be the highest evidence.

Court:

What do you mean by the question?

Defendant:

I mean this, our Honor, what he found out from what he has just been talking about, that it was based on what he found out from the official records.

Court:

We don't know what their records are. The Seaboard Air Line Railway is very important, but their records have no particular sanctity.

Defendant:

I may explain to your Honor what I am about, what I am after.

Court:

I just injected myself into it as I thought it was hearsay and I didn't know how important it was.

Defendant:

In giving your testimony try as far as possible, Mr. Witness, to avoid hearsay testimony, avoid conclusions.

Court:

If you don't know a thing of your own personal knowledge say so. If you know they said something about it being under seal, your statement would be a conclusion. You can state any fact that you wish and let the jury draw the conclusions.

Q You say that this cotton went to the Waller Warehouse Co. You know who was the warehouseman for the Waller Warehouse Company?

A I don't know the name of the warehouseman.

Q I ask you what firm they represented?

A It went to them for the John W. Gleason Cotton Company.

Q Did you go to the John W. Gleason Cot-
104 ton Company themselves about it?

A Yes, sir.

Q Who did you see in their office? Do you remember?

A No, sir, I don't remember the name of the party I saw. I first went to the Waller Warehouse Company and then to the John W. Gleason Cotton Company.

Q Did you see these various gentlement of the John W. Gleason Cotton Company testify here on yesterday?

A Yes, sir.

Q Did you recognize them?

A Yes, sir; I think it was Mr. McLoughlin that I saw.

Q Why did you go to see them about these three bales of cotton?

A. I was informed by the Waller Warehouse Company.

Plaintiff:

I object to that, your Honor.

Court:

May I ask why is that competent? Why is it competent as to what was in his mind? Doesn't that lead us back to where we were a minute ago?

Defendant:

I don't think so, your Honor, for this reason: If you will recollect it was testified here that this Special Agent had been investigating discrepencies, and now as to the conduct of the parties I think it is competent to put up this special agent to show what the investigation resulted in with reference to this discrepency and whether his investigation was such as to make him consider it was merely an error, or to put him on suspicion that something was crooked?

105 Court:

The mere fact that he was suspicious, is that any reason why the Railroad should be suspicious?

Defendant:

It is charged here your Honor, that the defendant had cause to suspect. Now the only way they could get that cause to suspect was from this information.

Plaintiff:

The statement I am objecting to your Honor, was that the witness said he was told, that he was told by Mr. Waller, and I interposed an objection.

Court:

The question was whether, or why he went to make this inquiry of the John W. Gleason Cotton Company?

A. Yes, sir.

(Witness): I will have to answer that I had information—

Plaintiff:

That is what we are objecting to, your Honor.

Court:

Go ahead, I will let him testify. We can rule it out if it is not competent.

A. I had information that this cotton had been loaded on the Island in a car for the John W. Gleason Cotton Company, and went by the way of the Waller Warehouse Company, and I traced it from the Waller Warehouse Company to the John W. Gleason Cotton Company, to them, and I went to the John W. Gleason Cotton Company to verify the information, that the return showed it had been transmitted from the Island to the Waller Warehouse Company and from them to the John W. Gleason Cotton Company.

Court:

Now, I think the only thing competent here is that he went to inquire whether the three bales of cotton was there. His testimony about loading it in a car and about the conclusion of his that will go out, and will let remain in simply that he went to the John
106 W. Gleason Cotton Company to inquire whether the three bales of cotton for which he was searching was there.

Q When you saw Mr. McLoughlin he told you about this cotton?

A He told me, if it was Mr. McLoughlin, I think it was, one of Mr. Gleason's representatives in his office, that they had received the three bales of cotton, that were respectively No. 3, 4 and 5.

Q Did he tell how they had received them?

A Yes, sir; received that bill of lading from Claxton, Ga., shipping to the John W. Gleason Cotton Company.

Q Well then, that cleared that, that cotton belong to them?

A Yes, sir.

Q On three bales?

A Yes, sir.

Q Up to that time, that was the 18th of the month, up to that time did your investigation into this discrepancy of cotton lead you to conclude there was anything crooked or merely an error?

Plaintiff:

I object to the question, your Honor?

Court:

One minute, what is the objection?

Plaintiff:

The objection was as to the conclusion. We think the jury should draw the conclusions and not the witness, your Honor.

Defendant:

I respectfully submit, Your Honor, that where the defendant is charged with knowledge, or reason to suspect, the man who conducted the investigation is competent to testify whether anything he discovered made him

suspect anything. The question I want to ask
107 him is, did he at that time suspicion anyone with wrong doing, or did he suppose it was merely an error?

Plaintiff:

I object to that your Honor, on the ground that suspicion is necessarily a conclusion. It is what this man suspicioned, what he ought to have suspicioned.

Court:

He is charged with having actual knowledge of this man's wrong doing. Suppose—let's illustrate—suppose it would be proven that this man, this Special Agent, saw Mr. MacDonnell put his hand in a drawer and take out a roll of bills and put them in his pocket, and it turned out that Mr. MacDonnell had stolen that money, would it be competent for this man to relieve the Seaboard Air Line Railway Company of knowledge by simply coming up and testifying—"I was not suspicious, I thought it was his money"? Isn't it for the jury to determine whether they had the knowledge?

Defendant:

Mr. Hartridge in his opening statement to the Jury, your Honor—

Court:

We will omit the opening statement, the pleadings govern. You said the pleadings govern?

Defendant:

I said they ought to.

Court:

They will govern, the issues are made by the pleadings and not by his statement.

Q. I will ask him this question, as a question of fact:

Did you suspect this man MacDonnell of being guilty of wrong practice, or defaulting?

108 Plaintiff:

If the Court please, I submit that is subject to the same objection, I think it subject to the same objection. I object upon the ground that it might be this gentleman may be correct in saying he didn't suspect, but the jury would draw the conclusion that he ought to have suspected, and so I submit that the proper way would be to let the jury conclude whether a reasonable man ought to have suspected or suspicioned. We are not bound by his suspicion or want of suspicion, but we are bound by the facts.

Court:

My understanding is that your charge is actual knowledge. You charge that they had actual knowledge of his wrong doing and not constructual knowledge?

Plaintiff:

That is right, your Honor.

Court:

I think it is competent for this man to testify what he suspicioned, but that would not necessarily establish the innocence of the Seaboard Air Line Railway Company. Answer the question. Did you at that time suspicion Mr. MacDonnell?

A. No, sir. I didn't suspicion Mr. MacDonnell.

Q. When did you first suspicion Mr. MacDonnell of being guilty of defalcation?

A. I suspicioned Mr. MacDonnell of being connected with this wrong doing after it had been reported to me that he had fled from Savannah and was gone.

Cross Examination.

Q. If I understand you right, Mr. Witness, you didn't suspicion Mr. MacDonnell until he had fled?

A. No, sir.

109 Q. If he had not fled you would still regard him as an honest man?

A. I don't know.

Q. You know when this transaction started?

A. My first information about the bill of lading was on March 18th, 1925.

Q. That is the first time you heard of the instance?

A. Yes, sir; the Bell transaction.

Q. What other agents has the Seaboard Air Line Railway in this territory?

A. They have W. E. Lennon stationed in Savannah.

Q. You happen to know that the Bell transaction started back on the 9th of October, 1924?

A. No, sir.

Q. Then assuming it did, then it took you from the 9th of October, 1924, until March, 1925, to know there was something wrong about it?

A. I am located in Jacksonville, Fla., and Savannah is on what is known as the Alabama Division of the Seaboard Air Line Railway. I know nothing about anything that transpired until the three bales of cotton checked short from Scotia, S. C. That was the first case I handled in connection with cotton at Savannah.

Q. The Bell cotton was from Claxton, Ga., are you are talking about Scotia, S. C., and your Special Agent?

A. I am talking about Scotia, S. C., the original way bill was from Scotia, S. C., the forged way bill was from Claxton, Ga. It arrived on the 18th of March, and there was a forged way bill.

110 Q. You have the way bill?

A. No, sir; it is not in my possession.

Q. It is in somebody's possession, holding for the Railroad?

A. I do not know, sir.

Q. Where did you see it last?

A. I saw it at the John W. Gleason Cotton Company's offfice on March 18th, 1925.

Q. You have not seen it since then?

A. I have not.

Q. The way bill was dated Scotia?

A. No, sir; the bill of lading was.

Q. I mean the bill of lading?

A. Yes, sir; was issued at Claxton, Ga.

Q. What did Scotia have to do with it?

A. There was a real shipment, bona fide shipment from Scotia, S. C., on the 20th day of September, 1924, on way bill No. 16 to Savannah, Ga., to Middleton & Peterson.

Court:

How do you know that one of these bills of lading was forged and the other was not?

A. I went to Claxton, Ga., and saw the agent and saw the records, and there was no record of his having issued any.

Q. How do you know the record in Scotia was not forged?

A. Because I went there and examined the shipping record, and talked with the one who handled the three bales of cotton, the agent who handled the three bales of cotton, and the shipper, P. F. Russell, and it was a genuine shipment.

111 Q. Mr. Gleason simply claimed the cotton in good faith as having come under this way bill that was shown you?

A. From Claxton, Ga., yes, sir.

Q. Was there anything on the way bill from Claxton to indicate it was a forgery?

A. No, sir.

(Cross Continued.)

Q. Do you remember the date?

A. No, sir; not the exact date.

Q. You know it went back as far as October, 1924?

A. There was only one bill of lading that I saw and that was dated the first part of 1925, must have been.

Q. Why do you say it must have been?

A. Because it was after the shipment of cotton had come from Scotia to Savannah, and came from Scotia to Savannah on December 21. The train records show that the car reached Savannah on the 21st and went to the Island on the 22nd, 1924.

Q. When were you called into the matter?

A. The papers were turned over to me by the Superintendent of the South Carolina Division some time just previous to my investigation on March 18th, 1925; as to what date, I don't recall.

Q. What is your territory?

A. My territory is from Risa Junction to Jacksonville, and from Jacksonville to Columbia, S. C., skipping Savannah.

Q. Why did they call you into the Savannah Division?

A. This was on the South Carolina Division, originating at Scotia.

Q. Therefore, that put you into Savannah?

112 A. Put me anywhere to trace that shipment.

Q. There was a shipment from Claxton?

A. Yes, sir.

Q. You mean it was a bill there and certain cotton originated at Claxton for Savannah?

A. Yes, sir.

Q. Now, you have got me kind of confused? Where did Scotia come into it—the bill of lading was forged from Claxton and there was a real shipment from Scotia?

A. Yes, sir.

Q. And that shipment became confused with the forged shipment?

A. I hardly know how to explain it to you, if I make a statement that is not right I don't mean it. The three bales of cotton were loaded at Scotia, S. C., on Dec. 20th, 1924, marked PFR 3, 4 and 5, and that cotton came to Savannah and went over here on the Island, and a record was made that the three bales were short. Now, understand, there was more cotton in the car than the three bales I am talking about, there were other bales—

Plaintiff:

If the Court please, I object to his testifying about that cotton.

Defendant:

If the Court please, it was brought out by his own question.

Court:

Just a minute, you have asked for the explanation and he is responding to that. He may not be able to respond and explain why he did certain things without telling of certain things that would lead up to these
113 facts.

Plaintiff:

Then I will withdraw the question if the Court please.

Q So, your testimony here is largely based on the records and what other people told you?

A Absolute records.

Q How did Bell happen to get away from you?

A I don't know there is such a being as Bell.

Court:

What was the question?

Q You didn't know that there was an individual by the name of J. O. Bell mixed up in this transaction? Is that the first information you had of it?

A I knew there was a man purported to be J. O. Bell that went to the John W. Gleason Cotton Company and got this money.

Q How did he get away from you?

A I had no occasion up to March 18th to know anything about him, or any crooked transaction he was connected with. I made an effort to locate J. O. Bell and have never been able to find him.

Q Who is Tillery?

A He is Special Agent of the Seaboard Air Line Railway Company, for the Alabama Division.

Q Stationed in Savannah?

A Yes, sir.

Re-Direct Examination.

Q. At the time you had a talk, March 18th, in Mr. Gleason's office with one of his representatives there, you have any discussion with him about investigating discrepencies of cotton in Savannah?

114 Plaintiff:

Unless that is connected with this case, your Honor, I object.

Defendant:

How can I ask him anything until I find out—

Court:

I don't see that it is responsive in any way to anything brought out on cross examination.

Defendant:

It would be responsive if he did have any such conversation with him.

Court:

There has been no interrogation on cross examination if they had such a conversation. That could have been brought out originally by you on direct examination.

Defendant:

If your Honor, please, J. O. Bell's name was brought out on cross examination.

Court:

If you want to ask anything about Bell it is quite competent for you to do so.

Q. Did you have any conversation on March 18th with these representatives in the John W. Gleason Cotton Company's office with reference to this J. O. Bell matter?

A. I asked them who J. O. Bell was and if they could give me an idea where he lived, that I might locate him, that I would like to see him.

Q. Did they claim he was a customer of theirs?

Court:

Just let him answer. Let him say what they did say about Bell.

Q. What did they tell you about Bell?

A. They told me that Bell had cotton on one, two or three occasions shipped to them before, they knew him, described him to me, and told me they knew where he stopped at when in Savannah. He didn't claim to live in Savannah but he had some relatives in fact
115 on Charlton Street and when in Savannah that he stopped with his relatives on Charlton Street.

Q. Why do you think these three bales of cotton originally shipped from Scotia was the same cotton they claimed to hold under bill of lading from Bell?

Plaintiff:

We object to that, if the Court please, as being a conclusion.

Court:

Let him state the facts and not what he thought. Ask him any fact you want to bring out that is relevant otherwise.

Defendant:

I will try to conform to your Honor's ruling as far as I can, I mean to the utmost of my ability, and I hope if I fail to keep within the lines you will excuse me.

Court:

It seems to me so manifest that your inquiry drew from him necessarily a conclusion, based on some other papers, which are wholly hearsay or records of the Seaboard Air Line Railway Company, as the case may be. Under his own statement of a few minutes ago that all he has said is based practically on the records and information that he got from the Seaboard Air Line Railway and these other places.

Defendant:

To a certain extent, Your Honor, it couldn't be otherwise. I asked him why he did a certain thing or why he thought a certain thing, and I meant of course, and I insist my question meant on what facts he based his conclusion. Now, the question I recollect that I asked was why did he think these three bales of cotton from Scotia were the same three bales of cotton that
116 John W. Gleason Cotton Company were claiming from Claxton. State any fact that it was based on?

A. The similarity of the marks.

Q. How do you know that they were similar?

A. The Waller Warehouse Company records showed that.

Court:

There it is again—the Waller Warehouse Company records. The records are there, whatever they may be.

Q. I understood you to say that the Gleason Cotton Company showed you the bill of lading?

A. Yes, sir.

Q. Did that bill of lading show the markings on the cotton?

A. Yes, sir.

Q. What markings did they show?

Plaintiff:

If the Court please the bill of lading is the best evidence, he is asking about the markings shown on the bill of lading, going into a written instrument.

Defendant:

I would like to say this in that connection: Here is a document in the possession of the Gleason Cotton Company, and when he goes to them to ask them about three bales of cotton they show him that document in their possession and on the strength of that document they claim this cotton. Now, I submit we have not got that paper, it was shown by them, the paper in their possession, and we ought to be able to show by this witness that the reason he thought it was the same cotton was that the bill of lading they showed him showed it was the same marks.

117 Plaintiff:

My friends are laboring under a wrong impression. The paper is not in our possession, it was then. We had $10,000 when we lost it.

Defendant:

There is no evidence here to show where it is at this time, your Honor.

Court:

As I understood you to say at first, the bill of lading is now in the possession of J. W. Gleason Cotton Company?

Defendant:

I don't know where it is, and there is nothing in the evidence to show where it is, but at that time—

Court:

I doubt if it is competent testimony.

Plaintiff:

If the Court please, it is admitted that he is going into the contents of a written instrument. My friend says that it is in our possession. Assuming that to be true, the document could be produced under order of this Court, and if we didn't have it then he could go into secondary evidence. He is going into the contents of a written instrument. If he had wanted that paper all he would have had to do would have been to have called on us for it, and then we could show whether we could produce it, and then it would be a matter of evidence where this document was. The mere fact that he has not done that illustrates the unwisdom of asking that kind of question.

Court:

I will let it be answered. You can note your objection.

Plaintiff:

May I ask your Honor a question? I want to ask Your Honor to enlarge that ruling, so as to
115 show if this document is in the hands of the Seaboard Air Line Railway.

Court:

I passed upon the question and directed that it be answered.

Q As I understand then, your reason for thinking that three bales of cotton from Scotia, S. C., was this cotton, was that they showed you this paper with the same markings on it?

A They showed me the paper and told me they had bought three bales of cotton, Nos. 3, 4 and 5, marked FRP, or FPR.

Court:

He has already testified to that.

Defendant:

That is the first time he has ever testified, your Honor, that it was the same markings.

Re-Cross Examination.

Q When you notify Mr. McLoughlin it was a forgery? Did you ever notify him?

A I cannot remember. I was here on the 19th, I cannot remember the exact time. I went to the John W. Gleason Cotton Company on the 19th, but I don't know that I notified Mr. McLoughlin.

Q If you didn't represent it to Mr. McLoughlin, who did you notify? Pick out the man you notified. I have them all standing up?

A It has been two years ago, and I went there with Mr. Moyland and Mr. Glaiber.

Q Did Mr. Moyland and Mr. Glaiber know these gentlemen personally?

A Yes, sir.

Q That was not the 20th?

A No, sir.

Plaintiff:

That as the date your Honor that Mr. MacDonnell defaulted.

A. It may have been the 20th.

Q. You know that the Waller Warehouse Company are also the warehousemen for Middleton & Peterson?

A. I am not acquainted with that.

Q. Did you find that out?

A. No, sir; I didn't find that out. My understanding was that the Waller Warehouse Company represented the John W. Gleason Cotton Company and that Middleton & Peterson were represented by some other warehouse.

Q. Never mind if you don't know, it makes no difference.

Court:

Just confine yourself to your questions, and not make any statements.

Witness excused.

H. G. GLAHER, a witness called by the defendant, being first duly sworn, testified as follows:

Direct Examination.

Q. What is your name?

A. H. G. Glaiber.

Q. Mr. Glaiber, what was your position during March, 1925?

A. I was agent of the Seaboard Air Line Railway Company, located in Savannah.

Q. What is your present position?

120 A Agent, Seaboard Air Line Railroad.

Q Has your position as such been continuous since March 1925?

A Yes, sir.

Q When did you first come here to Savannah as agent for the Seaboard Air Line Railway Company?

A On October 1st, 1924.

Q Where had you been prior to that time?

A At Charleston, S. C.

Q In what position?

A As agent for the Seaboard Air Line Railway since Feb. 1st, 1915, Feb. 1st, 1915 to Oct. 1st, 1924.

Q Prior to being agent in Charleston had you been engaged over there in the cotton business or employed in a cotton house?

A No, sir.

Q Are you familiar with the transportation of commodities, and especially cotton, between Charleston, S. C., and Savannah, Ga.?

A Yes, sir.

Q I want to ask you, Mr. Glaiber in your experience as a transportation man, would any cotton coming from Charleston, S. C., to a factor in Savannah, Ga., come to Hutchinson's Island?

A Yes, sir; it could come, but it is a very unusual thing for cotton to move from Charleston to Savannah.

Q The question is did it come?

121 A Yes, sir; that is probable.

Q How often during your experience, during all these years, have you known of cotton shipments coming from Charleston to factors in Savannah? Is that usual or unusual?

A Very unusual. I have a distinct recollection of one shipment from Charleston to Savannah in my nine and a half years experience.

Q. Now, Mr. Glaiber was there anyone at Hutchinson's Island that was superior to you in position?

A. Not on the Island.

Q. You are the chief representative in charge?

A. Yes, sir.

Q. Did you know any man by the name of J. G. MacDonnell, or did you at that time?

A. Yes, sir.

Q. Who was he and where was he employed?

A. He was employed in the agency of the Seaboard Air Line Railway on Hutchinson's Island as export cotton clerk.

Q. Under you?

A. Yes, sir.

Q. What were his duties?

A. His duties were to record the shipments of cotton as they arrived, and dispose of them in accordance with the instructions that he received from the consignees of such shipments and notify seller.

Q. What was the usual form of notice you had sent from your office?

A. In some instances we notified some consignees verbally by 'phone, and that was followed up by a written notification.

Q. Now, Mr. Glaiber, do you remember Mr. MacDonnell making any request for leave of absence on March 17th, 1925?

A. Yes, sir.

Q. To be absent the following day?

A. Yes, sir.

Q. What leave did he ask for and for what purpose?

A. Now, he didn't make inquiry through me personally, he made the request through the chief clerk.

Q. Very well, don't answer that. Who was the Chief Clerk?

A J. W. Moyland.

Q I will ask this question: In the course of the cotton season to what extent does it happen that there are discrepancies in reference to shipments and delivery of shipments, making cotton either over or short?

A They have overs and shorts very frequently.

Q Would or would not the fact that any particular shipment showed cotton either over or short excite your suspicion of anything being wrong?

A No, sir; absolutely not.

Q When a shipment—for example, suppose a shipment gets into the Island about the 20th of December, 1924, a shipment of six bales of cotton, and that for some reason or through some error, or whatever it may be caused by, three bales of that cotton were de-
123 livered to the wrong party, would it be usual or unusual that that should remain undiscovered for a considerable time?

A I don't consider it so.

Q Consider it what?

A That it is unusual.

Q You know anything about the three bales of cotton that was testified had started from Scotia, S. C.?

A Yes, sir.

Q What do you know about that of your own knowledge?

A When Mr. Sumner was investigating this discrepancy and it developed that the three bales had not been delivered to the originally billed consignee, we went to Mr. Gleason's office, which was on March 18th.

Q Who is "we"?

A Mr. Sumner and myself.

Q What took place there?

A While in Mr. Gleason's office in talking to them about the three bales of cotton a bill of lading was

produced showing Claxton as the point of origin and J. O. Bell as the consignor, and on the three bales delivered them was an advance made to one J. O. Bell on this shipment.

Q. Now, one moment, with whom were you talking as representing The John W. Gleason Cotton Company at that time?

A. My recollection is that we were talking to Mr. McLoughlin.

Q. Go ahead?

124 A. When that bill of lading was produced we examined our records at the office, and found none covering the shipment of three bales of cotton from Claxton, from J. O. Bell, Claxton, to the J. W. Gleason Cotton Company, Savannah, Ga., but there was a possibility of there being an omitted record, and Mr. Sumner went to Claxton to see if there was such a document issued.

Q. Was G. D. MacDonnell in the office of the Seaboard Air Line Railway on March 18th, 1925?

A. No, sir; that was the day he was granted leave of absence.

Q. He was absent on leave that day?

A. Yes, sir.

Q. When did you first hear about this forged bill of lading and the draft for $10,000?

A. On March 20th at about noon.

Q. How did you hear it?

A. Through Mr. Moyland, the Chief Clerk, who called my attention to the records which were posted by Mr. MacDonnell, and informed me at the time.

Plaintiff:

If the Court please, I submit that is clearly not admissible.

Defendant:

If the Court please, he has not said anything about the contents of a written instrument.

Plaintiff:

My objection was made in order to stop him.

Defendant:

I think your question was as to hearsay, you asked him how he learned about it. If he heard it he heard it from somebody.

Q. You say you heard that?

A. Yes, sir; my attention was first called to
125 it by Mr. Moyland.

Q. What did you do?

A. I called Mr. H. M. Carter, our agent at Charleston, over long distance 'phone to ascertain if any such shipments of cotton were forwarded from that point covered by these way bill numbers.

Court:

In as much as that is agreed to why go into that feature of it?

Defendant:

If your Honor please, all I am going to do is to connect that up with the agreed statement of facts we have here.

Q. Now, then Mr. Glaiber, when did you first suspicion Mr. MacDonnell of being guilty of any irregularities?

A. I cannot say that I suspicioned him at all. I came to that conclusion after this.

Q. You mean after the exposure of the forged bill of lading?

A. Yes, sir.

Q. Before you learned of this bill of lading and this $10,000 draft had you any suspicions of Mr. MacDonnell?

A. No, sir.

Q. When you heard from Charleston that this bill of lading was fictitious or forged what did you do then?

A. I called up our special officer, the special agent on the Alabama Division, Mr. W. E. Tillery and gave him the information, and requested him to immediately go to Charleston.

Q. Did you know at that time on whom the draft, on whom the draft was drawn, on what bank or
126 anything of that sort, or did you find that out later?

A. I don't recall that.

Court:

Isn't this all after the event, what difference does it make? All of this after the event. Whatever wrong if any, had been done, was already done?

Defendant:

The reason I asked him what he did—but never mind.

Q. Do you remember on that 20th day of March a little after one o'clock in the day going to the office of the John W. Gleason Cotton Company with Mr. Moyland?

A. I don't recall the dates that I went to the John W. Gleason Cotton Company's office after that, because I made more than one trip. It may have been on the 20th.

Q Do you remember going there at all on the morning of the 20th or the day of the 20th?

A. That is what I say, I don't remember the exact date, because I went to Mr. Gleason's office on more than one occasion, and it may have been on the 20th or it may have been on the 21st.

Q Do you remember at any time, either on the 18th, 19th or 20th of March, 1925, having a conversation in Mr. Gleason's office with Mr. Doolan at that time?

A Yes, sir.

Q And at that time what, if anything, did you say to Mr. Doolan?

Court:

Ask him what it was, what was the conversation?

Defendant:

All right, sir.

Q At that time did you tell Mr. Doolan—

127 Court:

That is just it. Ask him what he told him, let him give the testimony.

Q At that time what did you tell Mr. Doolan with reference to having any suspicions about Mr. MacDonnell?

A I didn't tell him anything of having any suspicions of Mr. MacDonnell.

Court:

Just a minute.

Defendant:

Now, your Honor, when something is testified to, and we state the time and place, I can ask him if he said that?

Court:

He is your witness, you have identified the time and place, and if you ask him what was the conversation that is for him to tell it, it was not for you to say anything about suspicions, or three balls, or forgery, or anything else. It is for him to do the testifying and that is the reason I ask you not to lead him. Just ask the question and let him answer.

Q Go ahead and answer?

A I cannot recall the conversation after two years, but I can—

Court:

Never mind, don't profet anything. The only way we can pass on it is by question.

Defendant:

We can say within our knowledge we didn't make such and such a statement?

Court:

Go ahead, sir.

A I deny most emphatically that I told Mr Doolan or Mr Gleason that Mr. MacDonnell was suspected, and I make that statement for the reason we didn't
128 know of these irregularities until afterwards.

Mr. Hunter:

If the Court please, may I ask a question?

Court:

Certainly.

Q Mr. Glaiber, this fraudulent transaction of Mr. MacDonnell's in regard to the $10,000 draft, this 110 bale proposition, was that in any way in the pursuance of the Seaboard Air Line Railway Company's business?

Plaintiff:

If the Court please, I think that subject to objection on this ground. Whether or not the Seaboard Air Line Railway Company is bound by the act of its agent, acting within the scope of its business, is for your Honor to decide, not for this witness to say. We have proved this bill of lading was issued by Mr. MacDonnell. It is proved that Mr. MacDonnell told us that the cotton represented by the bill of lading was at the Terminals of the Company; it has been testified that was the duty of Mr. MacDonnell to notify the consignees generally of the arrival of the cotton. Now, whether they are bound by that act is a question for your Honor, I respectfully submit.

Court:

It depends on what the meaning of the question is. If you mean to let the witness testify as to whether or not it was a part of the business of the Seaboard Air Line Railway Company to be defrauding people, and whether or not this man's actions, if he undertook them, were in pursuance of his employment, I will permit it.

Defendant:

That is what I mean, your Honor.

Court:

You may then answer the question?

129 A. No, sir.

Q. Did it help the Seaboard Air Line Railway Company's business?

A. No, sir; in no way whatever.

Q. Did it hurt the Seaboard Air Line Railway Company's business?

A. I couldn't answer that question. That would be largely in accordance with the attitude of the consignee.

Q. Is it likely to hurt it?

A. Yes, sir.

Q. You say that Mr. MacDonnell had a leave of absence on the 18th?

A. Yes, sir.

Q. Did he again have a leave of absence on the 20th of March?

A. Yes, sir.

Q. Were they in regard to the duties of the Seaboard Air Line Railway Company or for private reasons?

A. He was absent for private reasons.

Plaintiff:

If the Court please, this is hearsay testimony again.

Court:

Never mind.

Q. After you found out there had been a fraudulent transaction that involved the Seaboard Air Line Railway Company by Mr. MacDonnell did you approve that transaction?

A. Most assuredly not.

Q You did not?

A No, sir.

Q You spoke of a conference with Mr. McLoughlin, at which you were present, and also a conference with Mr. Doolan and Mr. Moyland, and Mr. Sumner, you were discussing the shortage, I believe you said?

A Yes, sir; we were discussing the shortage, their shortage.

Q Did any of the John W. Gleason Cotton Company's employees suggest to you at the time that Mr. MacDonnell looked like the man who was guilty of this?

A No, sir.

Q Did they suggest to you that you should be able to immediately put your hand upon the man that was guilty of these acts?

A No, sir.

Cross Examination.

Q The Seaboard Air Line Railway Company has a line of railway between Charleston, S. C., and Savannah, Ga.?

A Yes, sir.

Q And goods offered to it for transportation is part of its business?

A Yes, sir.

Q The issuance of bills of lading is part of the business of the company?

A Yes, sir.

Q Notifying the consignees of the arrival of the subject matter of the bill of lading is also a part of the business of the company?

A Yes, sir; it is a custom.

Q. You say you checked up and you found
131 one shipment of cotton from Charleston, S. C., to Savannah, Ga.?

A. No, sir; I said I had a distinct recollection of only one shipment of this kind.

Q. Did you check the records to ascertain this?

A. No, sir.

Q. How long have you had a line of railway from Charleston to Savannah?

A. I think that line was completed in 1916 or 1917.

Q. And opened for business at that time?

A. Yes, sir.

Q. Freight business?

A. Yes, sir.

Q. The Atlantic Coast Line Railway Company also had a line between these two points, an established competitor?

A. Yes, sir.

Q. And that line had been there since the Civil War?

A. Yes, sir.

Q. You know nothing about shipments over that line?

A. No, sir.

Q. Or shipments by boat?

A. No, sir.

Q. You do distinctly recall one transaction?

A. Yes, sir; over the Seaboard Air Line Railway Company.

Q. I understood you to say you couldn't recall a conversation between yourself and Mr. Moyland on the one hand, and Mr. McLoughlin and Mr. Doolan on the other?

A. I cannot recall word for word.

132 Q. Do you recall the substance of the conversation?

A. The substance of the conversation, which was on the morning of the 20th or 21st, was about the transaction.

Q. Are you certain it was on the 20th?

A. No, sir.

Q. Look at that paper and see if that does not refresh your recollection about it?

A. That is on March 19th.

Q. It was on March 19th, was it not?

A. Yes, sir.

Q. I understood you to say in answer to Mr. Anderson's question that you had a conversation with a number of people?

A. Yes, sir.

Q. They gave you the bill of lading that your special agent testified about?

A. Yes, sir.

Q. You have it?

A. I have not.

Q. The company has?

A. I don't know.

Q. You have not returned it to us?

A. No, sir.

Q. You know where it is?

A. Yes, sir.

Q. Is it in the Court Room?

A. Yes, sir; I think Mr. Anderson has it.

Plaintiff:

Have you got it, Mr. Anderson?

132½ Mr. Anderson:

I don't know, I will look and see. (To witness:) Look in those papers and see if it is there?

A. Here it is. That is the famous Bell one.

Q. There are two forged ones then?

A. Yes, sir; lots of them.

Q. Are you correct in saying that?

A. Yes, sir.

Q. Well, let's find out. How many have you got there, these forged bills of lading? This is a forged one, is that correct?

A. Yes, sir.

Q. How many other forged ones have you got there?

A. I think there are four or five.

Q. Let me have them all, please.

A. Here is one, here is another. That seems to be all.

Plaintiff.

Now, I have four here, all in the name of J. O. Bell.

Q. Now, you signed this paper, I believe you said?

A. Yes, sir; March 19th, 1925.

Q. And that is for the four you have handed me?

A. Yes, sir.

Q. And that is your signature also?

A. Yes, sir.

Q. You still have those papers also, the ones represented by this receipt?

A. No, sir. (Referring to receipt signed by H. G. Glaiber, Agent, for four bills of lading from J. O. Bell, Claxton, Ga., receipt dated March 19th, 1925.)

Q. You have not?

133 A. No, sir, we have not the paper from J. O. Bell.

Q. Have you returned it to us? Never mind, it is not specially material. You did have it at one time?

A. I think they are still there with Mr. Anderson's papers.

Plaintiff:

We would like to have them; your Honor.

Defendant:

If the Court please, they have made no demand on us for them. I have no idea as to them. As far as I know all the papers that related to the case were in one package.

(Witness):

Here are your papers.

Plaintiff:

I just want our own papers, not yours. Just our drafts and records.

(Handed another bill of lading.)

Q. Then there are five of these bills of lading from J. O. Bell altogether?

A. Yes, sir.

Re-Direct Examination

Q. These bills of lading are all issued for the J. O. Bell transactions?

A. Yes, sir.

Q. And those checks are J. O. Bell checks?

A. Yes, sir.

Q. And these five checks are payable to J. O. Bell from the John W. Gleason Cotton Company?

A. Yes, sir.

Q. And the John W. Gleason Cotton Com-
134 pany handled all those forged transactions here?

A. Those show the name of the John W. Gleason Cotton Company, as consignee.

Q The John W. Gleason Cotton Company gave the checks?

A Yes, sir.

Q They paid them.

A Yes, sir.

Q This had all happened prior to the time that you had this conference that you spoke of with Mr. McLoughin that you referred to?

A Yes, sir.

Q Did they at that time tell you that they suspected any connection between J. O. Bell and Mr. McDonnell?

A No, sir.

Court:

You have already asked him about that.

Re-Cross Examination.

Q When did you notify them they were forgeries?

A I don't know that I ever notified them they were forgeries.

Q Look at this and see if your answer to counsel was not in error?

A No, sir; here is one.

Court:

When a bill of lading is issued by a railroad does it issue more than one copy of the bill of lading?

A Yes, sir; the usual number is the original and two copies.

Q Does this No. 1 represent the original?

A That is the original.

Q The two copies go where?

135 A The two copies, the original and the memorandums go to the shipper, the third copy, which is described as the shipping order, is retained by the transportation company.

Q. The shipping order is in the nature of an order from the shipper?

A. Yes, sir.

Q. It is not a copy of the bill of lading, because it is an order and not a bill of lading?

A. But it is the same thing.

Q. But substantially it is that it may be shipped as above?

A. Yes, sir.

Q. So it is the action of the shipper and not the company?

A. Yes, sir.

Q. When cotton is shipped under a bill of lading is it customary to deliver the cotton without relinquishment of the bill of lading?

A. On straight shipments, yes, sir.

Q. You do not take them up?

A. No, sir, only on order notify.

Re-Direct Examination.

Q. I want to ask you when did you first discover that these J. O. Bell bills of lading were forged?

Court:

I think he has been asked about that. He said he didn't know anything about these transactions until afterwards?

136 Defendant:

Very well, sir.

Witness excused.

J. W. MOYLAND, a witness called by the defendant, being first duly sworn, testified as follows:

Direct Examination.

Q What is your name?

A J. W. Moyland.

Q Where were you employed during March, 1925?

A I was chief clerk to the Freight Agent of the Seaboard Air Line Railway Company over on the Terminals at the Island.

Q Who was your immediate superior officer?

A Mr. H. G. Glaiber.

Q How long had you been in that employ?

A You mean in the employ of the company, or as chief clerk?

A [Q.] I mean as chief clerk?

A Approximately seven years.

Q Where are you now employed?

A I am employed by the Seaboard Air Line Railway Company, with headquarters in Savannah.

Q On the Island?

A No, sir; I am over here now.

Q Now, Mr. Moyland, did you know Mr. G. D. McDonnell, who was on the Island on March 17th and 18th, and 19th, of the year 1925?

A I did.

Q What application for leave of absence did
137 Mr. MacDonald make to you on March 17th, 1925?

A He asked to be allowed to be absent on the 18th and again on the 20th.

Q For what purpose?

A To stand an examination as certified public accountant in Atlanta.

Q At the time he made that application to you for leave of absence had you any reason to suspect him of wrong doing in any way?

A I did not.

Q Was he there on the 18th of March or was he absent on the 18th of March, on leave?

A He was absent on the 18th of March.

Q Now Mr Moyland, where was he on the 19th of March?

A He was at his work on the Island.

Q He came back in accordance with his leave?

A Yes, sir.

Q Where was he on the 20th of March, was he there?

A He was not.

Q When did you first learn that instead of going to Atlanta he had gone to Charleston on both of these dates, the 18th and 20th?

A Well, not definitely until they had identified MacDonnell's photograph as being the man that drew the monies at Charleston.

Q You mean got the money on that draft?

A Yes, sir.

Q When did you first learn about this forged bill of lading for the one hundred and ten bales of cotton, and the draft for ten thousand dollars on the John W. Gleason Cotton Company?

A Well, I would say it was the 21st or 20th. I don't know which particular date.

Q You mean of March, 1925?

A Yes, sir.

Q Where did you hear it from?

A I heard it through the Special Agent's Department, I believe.

Q Have you any recollection of the John W. Gleason Cotton Company calling you up at any time on the 20th and asking you about three cars of cotton that was supposed to be there for them?

A I have.

Q About what time on the 20th was that?

A I do not recall the time. I could approximate it.

Q Well, approximate it?

A Eleven o'clock.

Q About eleven o'clock?

A Yes, sir.

Q What did you do then? Had you any knowledge yourself of the arrival of these three cars that we are talking about?

A Not until—

Q I will ask you first the question. Did you have any personal knowledge of the arrival of these
139 three cars that we are talking about, that they asked you about?

A No, sir.

Q Now, those cars, when were those cars supposed to arrive in Savannah?

A The 19th.

Q And when they asked you about those three cars was Mr. MacDonnell there with the others or was he absent on his leave?

A He was absent.

Q What did you do when they asked you about those three cars?

Court:

May I ask whether all of these actions after the event would help one way or another? We know it is admitted there were no such cars, they were not shipped and they

were not received, so he couldn't have gotten them. So this matter on the 20th was after the payment of the draft?

Defendant:
Yes, sir.

Court:
Then why does anything he did after that time help either side?

Defendant:
Because, as I understand it, they are claiming here that if they had found out about this cotton earlier they could have stopped the draft, and I am trying to show by this witness what he did about the time that was necessarily taken up that morning in dis-
140 covering there was no such cotton in Savannah.

Court:
That is not the basis of the suit as I understood it. The basis of the suit is because of a misrepresentation by an employee of the Seaboard Air Line Railway Company on the 19th, and the draft was paid on the 19th acting upon that representation and not afterwards.

Q When did you first suspect Mr. MacDonnell of being guilty of any irregularities, this or any other?

Court:
Did he not say on the 21st? He has already answered it.

A I said the 20th or 21st.

Q Did you hear the result of the inquiry on Charleston for information about these cars?

A Yes, sir.

Q When was that?

A On the 20th.

Q When did you so learn from Charleston?

A On the 20th, that there were no such cars shipped from Charleston.

Q Did you then suspicion Mr. MacDonnell?

A I did.

Q Did you on the 20th of March, 1925, go to the office of the John W. Gleason Cotton Company, about one o'clock, or shortly after one, in company with Mr. Glaiber, and have any talk with Mr. Doolan?

A I did.

Q What was that talk?

A We discussed this particular 110 bales of cotton, the bills of lading, and we, if I recall it, we
141 discussed the discrepencies in their cotton and may have intimated that this particular 110 bales of cotton would be connected with these discrepencies due to Mr. MacDonnell.

Q Did you or not tell Mr. Doolan at that time, previous to March 19th, 1925, you had knowledge of Mr. MacDonnell's defalcations?

A No, sir; I did not tell him that.

Q Now, Mr. Moyland, when you discovered from Charleston that this whole thing was a forgery and a fraud, what, if any, information did you give to the John W. Gleason Cotton Company about it?

A I didn't give them any information. You mean as a result of that telephone conversation on the 20th?

Q Yes, you tell them what Charleston said?

A I don't know whether we telephoned them or informed them when we went over together, Mr. Glaiber and I, to their office.

Q I want to ask you now this question: Whether or not on March 20th, when you found out from Charleston

that there was no such shipment of cotton, whether you about mid-day of that day notified The Gleason Cotton Company by 'phone that Charleston made this report and you thought it was a forgery and you were checking it up?

Court:

Has he not just answered that?

Defendant:

I don't think so, your Honor.

142 Court:

My recollection is that he said he didn't remember whether he communicated with them by 'phone, or waited until he went over there?

Witness:

I did.

Q. Do you remember the John W. Gleason Cotton Company, or any of their officers, calling you up about mid-day and asked you what you had learned about the three cars of cotton?

A. I don't remember the time; I believe I had several conversations with the John W. Gleason Cotton Company over the 'phone, from the time they first called about the cotton, until we got some definite information as to the cotton.

Q. That definite information I understood you to say you did not receive until about noon or afternoon?

A. Yes, sir; until afternoon.

Cross Examination.

Q Mr. Moyland, how long was Mr. MacDonald over there as cotton export clerk.

A About four years.

Q I want to ask you now if it is not a fact that on the 20th day of March, 1925, keeping your mind on that day, before you heard from Charleston on the morning of the 20th—you know Mr. Doolan?

A Yes, sir.

Q You know his voice over the telephone?

A Yes, sir.

Q I will ask you if he didn't call you up
143 and have a conversation with you in regard to the delivery of the cotton in the way spoken about, and you said "wait a minute" and you went back and asked—

Defendant:

I object your Honor—

Court:

Wait a minute and let him finish asking the question and the witness will not answer until I have ruled on same.

—and you told Mr. Doolan to wait a minute and later told him in the same conversation that the cotton had been transported to the Gleason Cotton Company's warehouse, and Mr. Doolan replied that the Atlantic Coast Line Railway had no record of having received the cotton on the afternoon drill, and you then said you would get in touch with the yard master of the railroad and report to him in a few minutes?

Defendant:

If the Court please, our objection is that it does not follow the pleadings and is not relevant to the issue made by the pleadings, which allege they acted solely upon Mr. MacDonnell's telephone conversation and the answer given.

Court:

As I understand the interrogation by Mr. Anderson of this witness covered several conversations during the morning of the 20th, and he quite urged if he didn't notify them over the 'phone as to what had been learned about this cotton, and this witness has already testified, as I recall, in part at least, about a conversation at about eleven o'clock, and that I understand is a part of the conversation of which inquiry is now made,
144 and certainly he has a right to ask about the rest of the conversation.

Defendant:

Yes, sir; for the purpose of ascertaining whether or not at that time he had any knowledge.

Court:

You brought out part of it and he is now asking the rest of it. Answer the question, Mr. Witness.

A. He did.

Q. And you made those reports to him?

A. Yes, sir.

Q. And you told him it had been transferred to the warehouse because you had the duplicate transfer order before you?

A. Yes, sir.

Q. You were positive that the cotton was in your yard?

A. Yes, sir.

Q. You didn't see anything unusual in the transportation of that three cars of cotton coming from Charleston?

A. No, sir; I didn't figure it as being anything unusual.

Q. Do you recall the second conversation that you had, in which you told Mr. Doolan you would call him up, but you failed to do that, and about a half hour later he called you and asked you if you had located the cars, and you told him not to worry, that the cotton was in Savannah all right, but there seemed to be some little mix up in the movement after arriving here?

Q. I don't remember the words of that conversation, but there is a possibility that he did call and I was investigating what became of the cotton, which
145 necessitated him calling me again, but I don't recall that I told him not to worry, that the cotton was in Savannah. I don't believe I could have told him that from what I was trying to develop there.

Q. You deny that?

A. Yes, sir; on the second conversation.

Q. Did he not request you to make another special effort to get the location of the cars and you again assured him that he should not worry, that the cars were all right and would be sent to him? Isn't that the substance of it?

A. I cannot answer that in that way. I believe in the second conversation I told him that the cotton was here, but in investigating it, which I did promptly after he called the first time, I don't believe I could have told him the cotton was here in my subsequent conversation, because I didn't find any record of the cotton coming in.

Q. You recall that he called you the second time after you had failed to call him?

A. Yes, sir.

Q. As a matter of fact your records were absolutely clear in the matter?

A. Yes, sir.

Q. You had the way bill?

A. I didn't have the way bill.

Q. You had the number of the bill of lading and the number of the way bill, and everything was in proper order and there was nothing unusual about the transaction?

146

A. Yes, sir.

Q. Didn't you tell him that you would call him back in a few minutes and give him the exact information about it?

A. Yes, sir; I may have promised that I would tell him something definite about the cotton.

Q. The third time you failed to call him and he called you again about a half hour after the second call, he called you and then you said it looked like there was something wrong, that you had a long distance call in for Charleston?

A. I recall distinctly the first conversation, there were four or five conversations.

Q. Wasn't it the subject of Mr. Doolan's conversations that he was anxious to get in his cotton over to the warehouse?

A. Yes, sir.

Q. And you were anxious to help him get it there?

A. Yes, sir.

Q. And you couldn't understand why it had not gone over there?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. You accompanied Mr. Glaiber did you not at the time he had this conversation on the 19th?

A. No, sir; I didn't. I went over to the of-
147 fice of the John W. Gleason Cotton Company for the first time on the 20th.

Q. The talking was done mostly by Mr. Glaiber, was it not?

A. Well, I had something to say too, but I was with him.

Q. Most of the conversation was done—

A. Mr. Gleason was present also.

Q. But most of the conversation carried on was by Mr. Doolan in the office?

A. In the office?

Q. Yes?

A. Yes, sir.

Q. You deny that in your conversations Mr. Glaiber told Mr. Doolan that you had previously had enough evidence to convict Mr. MacDonnell of other wrong doings?

A. I deny that.

Q. Who forged these five bills of lading starting back in October of 1924?

A. Presumably Mr. MacDonnell.

Q. That was export cotton?

A. No, sir; local cotton.

Q. The same as this?

A. Yes, sir.

Q. It was cotton that came under the supervision of Mr. MacDonnell representing the Seaboard Air Line Railway Company?

A. Yes, sir.

Q. Then it was the Seaboard Air Line Rail
148 way Company's for that purpose, wasn't it?
A. Yes, sir.

Re-Direct Examination.

Q. Have you been asked the conversation with reference to the cotton in the morning?
A. Well, from whatever records Mr. MacDonnell made, whatever records Mr. MacDonnell had made.

Re-Cross Examination.

Q. Where are the records, have you got them up here in Court today?

Court:
There is no dispute about the records. There is no use going into that.

Witness excused.

W. E. TILLERY, a witness called by the defendant, being first duly sworn, testified as follows:

Direct Examination.

Q. What is your name?
A. W. E. Tillery.
Q. Mr. Tillery, what was your business in March, 1923?
A. I was Special Agent for the Seaboard Air Line Railway Company, in charge of the Police Department of the Alabama Division, Savannah Terminal.

Q. What is your present occupation?

A. The same thing.

Q. Mr. Tillery, when did you first hear about a forged bill of lading for 110 bales of cotton, issued
149 presumedly in Charleston, S. C., on March 18th, 1925, and having attached to it a $10,000 draft, drawn by a man named J. A. Tillman, on the John W. Gleason Cotton Company?

A. I would say at around one o'clock p. m., on March 20th, 1925.

Q. That was the first time you heard about it?

A. Yes, sir.

Q. From whom did you receive your notice or call?

A. I received a telephone message from Mr. Glaiber, the agent.

Q. What did you do?

A. We discussed it over the 'phone for some little bit—

Court:

Again may I ask why that illustrates any issue in this case, what was done after the 20th?

Defendant:

If the Court please, I wish to connect up the Charleston end of the transaction.

Plaintiff:

If the Court please, that is admitted.

Defendant:

Your Honor, this is the man that went to Charleston to investigate it.

Court:

If all the facts that were investigated are admitted why prove them again?

Defendant:

I want to show that he was the man that connected up the Charleston end of it.

Court:

If the Jury has already been told what happened in Charleston, as you gentlemen have stipulated it, as facts, doesn't that give them all the information?

Defendant:

Yes, sir, your Honor.

Court:

If you have agreed to it and the other side has agreed to it I don't see that there is any use in putting up any witness to prove it?

Defendant:

All right, sir.

Q Then it was on the 20th of March, 1925, that you first learned of this matter?

A Yes, sir.

Q Had you had any previous knowledge of any other dealings that you can trace to Mr. McDonnell?

A I have not.

Q When was the first time you ever discovered Mr. MacDonnell of being guilty of any wrong dealings?

A About that time, the 20th of March, at one one o'clock.

Cross Examination.

Q. You know that Mr. Glaiber's office is just next door, as it were, across the river, and just east of the City?

A. Yes, sir; I knew where it was.

Q. You knew you had the man Bell located over at the City Hall?

A. I couldn't get him?

Q. Why not?

A. I didn't exactly have him located.

Q. Didn't you tell Mr. McLoughlin that you had him located?

A. He was a different one.

Q. What month was that?

A. That was some time after this occurrence.

Q. What occurrence?

151 A. This unknown bill of lading.

Q. What were you doing between October and March to ascertain who was forging these bills of lading?

Court:

What difference does that make? It has already been testified and there is no evidence to dispute it that these transactions with Bell were not known before that time?

Plaintiff:

If the Court please, I wish to show that they were.

Q. You knew about these Bell transactions long before the MacDonnell transaction?

A. No, sir.

Q. You were not advised by Middleton & Peterson about these occurrences?

A. No, sir; all of this was developed by the Traveling Auditor checking up after this big transaction.

Re-Direct Examination.

Q. You say all of these Bell investigations were developed by the Traveling Auditor after this MacDonnell exposure?

A. Yes, sir.

Witness excused.

MR. GLAIBER was recalled to stand for further cross examination by Mr. Hartridge:

Q. When was this sooner occurrence of this larceny upon the Seaboard Air Line Railway Company, about the Bell matters, about the 19th?

A. The fact that Mr. Summer went to Clax-
152 ton on the night of March 18th and came back, and it developed there was no such shipment from Claxton.

Q. You know what started him to make this investigation on the 18th?

A. Yes, sir; the production of this bill of lading for three bales of cotton—that is what started him to Claxton.

Q. I will call your attention and see if you will not correct your answer that the bill of lading was dated Dec. 24th?

A. Yes, sir; but we had no knowledge whatever that that was issued until it was given to us by Mr. Gleason's representative on March 18th or 19th.

Q. You have the original of that letter up here in your possession, have you not, from Middleton & Peterson?

A. The orgiinal?

Q. Yes?

A. No, sir; I suppose that is in the possession of our freight claim department.

Q. Do you recall having received that letter?

A. No, sir.

Witness excused.

Defendant:

We rest.

153 W. A. SMITH, a witness called by the Plaintiff, in rebuttal, testified as follows, after being duly sworn:

Direct Examination.

Q. What is your name?

A. W. A. Smith.

Q. What is your occupation, Mr. Smith?

A. I am a cotton factor.

Q. What is the name of your firm?

A. The Savannah Cotton Factorage Company.

Q. How long have you been in the cotton business?

A. I have been in the cotton business since 1925.

Q. How long in the city of Savannah?

A. I have lived here for thirty years.

Q. How long have you been in the cotton business in the City of Savannah?

A. Since 1905.

Q. Do you know whether it is unusual or not for a cotton shipment to originate in the market of Charleston to be shipped to the market of Savannah?

A. It is not.

Q. Do you know Augusta and Macon?

A. Yes, sir.

Q. Are they market points also?

A. Yes, sir.

Q. Is it not usual for cotton to be shipped from these markets to Savannah?

A. It is not unusual; we have handled cotton from all of these points.

154 Q. How far is it from here to Claxton?

A. I think it is about fifty miles by rail, probably five miles further by road.

Q. You know whether or not telephone and telegraph facilities exist between Savannah and Claxton?

A. They do.

Q. Did you know a man by the name of MacDonnell, who used to be in the freight office of the Seaboard Air Line Railway Company over on the Island?

A. Yes, sir.

Q. Did you ever hear of a man by the name of J. A. Till through MacDonnell?

A. I have heard of him.

Q. Did you ever do anything in connection with him?

A. Mr. MacDonnell told me—

Q. Don't state the substance of the conversation. He did come to see you?

A. Yes, sir; he telephoned me.

Q. On the strength of that telephone message what did you do?

A. I wrote to Mr. Tillman at Charleston.

Q. Now, Mr. Smith, don't answer this next question, as the gentlemen on the other side I anticipate will object to it, so don't answer it until they have stated their objection and the Court has ruled on it. I would like to ask him if your Honor please, why he wrote the
155 as explanatory of the conduct. Hearsay is some times admissible to explain conduct.

Court:

We do not know what he wrote.

Plaintiff:

What I wish to do, if your Honor please, if you will permit me to do so, is to show that an experienced cotton factor, of 30 years experience, would do?

Court:

That as far as it goes, will be all right.

Plaintiff:

Never mind, sir.

Defendant:

That last question was not answered and of course Mr. Hartridge's statement has not probative value?

Court:

I never understood that it did.

Cross Examination.

Q. Mr. Smith, have you ever heard of shipments, or know of a shipment of cotton from Charleston to Savannah other than Sea Island Cotton?

A. I don't know of any Upland shipments from Charleston directed to our company, but we have handled Upland Cotton from other cotton markets from this section.

Q. You mean inland markets?

A. Well, Jacksonville market included, that is a port.

Q. Have you handled any from Charleston?

A. Never to me or my company, except Sea Island Cotton.

Q. And that was some years ago, and when Savannah was the Sea Island Cotton market of the world?

A. One of them.

Q. The main one?

156 A. Yes, sir.

Q. You have never heard of Upland Cotton being sent to a factor in Savannah from Charleston?

A. I said to my company.

A. I ask you if you have ever known of a shipment of Upland Cotton from Charleston to a factor in Savannah?

A. I don't remember it.

Q. Mr. Smith, why wouldn't you handle Mr. Tillman's proposition?

A. Because I didn't agree to advance as much as the other fellow did.

Q. He came to you first?

A. I don't know; Mr. MacDonnell 'phoned me that the cotton was on hand and asked me if I held the bill of lading.

Q. Asked you what?

A. Asked me if I held the order notify bill of lading for the cotton, which he said was on hand.

Q. Who said it was on hand?

A. Mr. MacDonnell.

Q. Had you not previously been approached by Mr. MacDonnell about handling this Tillman cotton?

A. Only that one time?

Q. Didn't you tell him that you didn't care to handle it?

A. No, sir.

Q. Didn't it look suspicious to you?

A. No, not to me, no, sir.

Q. You didn't handle it and you wouldn't
157 advance that much?

A. I evidently didn't agree to advance as much as the other fellow, because I didn't hear from it any more.

Q. You know what the market was in Charleston on the 17th of March, 1925?

A. No, sir.

Q. The cotton market?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. You handled some of the Bell cotton, did you not?

A. I think we handled three bales of it.

Q. You didn't handle any more of it?

A. I don't remember handling any more.

Q. Why now, why did you stop handling the Bell cotton?

A. Because he didn't ship any more. He came in in person and brought a lading and the cotton was delivered to the warehouse, and he came back later and got a check for the proceeds, came in person.

Q. That was before Mr. Gleason started handling the cotton?

A. I don't know.

Q. Who introduced Mr. Bell to you?

A. He introduced himself.

Q. Was he introduced to you by Mr. MacDonnell?

A. No, sir.

Q. Didn't you know something about Mr. Bell's transactions and refuse to handle any more cotton from Mr. Bell?

158

A. No, sir.

Re Direct Examination.

Plaintiff:

Now, your Honor, after having asked a portion of the conversation, I ask the right to put in the rest of it. They brought out what Mr. MacDonnell said to him and I want to bring out what he said to them?

Court:

They merely asked if Mr. MacDonnell brought Bell there to see him.

Plaintiff:

No, sir; he stated that Mr. MacDonnell called him up and asked if he had a bill of lading for Bell's cotton. I want to bring out the balance of it?

Court:

All right, sir.

Q. Now, sir, if you will please relate all the rest of that conversation, in substance?

A. Mr. MacDonnell 'phoned and said he had this cotton on hand, I think it was 100 bales, and asked if I had the original bill of lading and I replied no, and he suggested that I write to Mr. Tillman for the lading and I might get to handle the lot.

Q. Did you do it?
A. Yes, sir.

Re-Cross Examination.

Q. What date was this?
A. I don't remember, sir. I have not a copy of the letter with me.

Q. Was it before the draft came in to the
159 John W. Gleason Cotton Company?

A. I don't know.

Q. You remember hearing about the draft coming in to them?

A. I remember, but I don't remember the date.

Q. You remember the conversation with Mr. MacDonnell was prior to that time?

A. I presume it was, I cannot say positively.

Witness excused.

Plaintiff:

We wish to tender in evidence, if the Court please, as our

EXHIBIT No. 5

six checks, on the Citizens and Southern Bank, Savannah, Ga., signed by the John W. Gleason Cotton Co., per J. J. Doolan, Atty., and W. M. Doherty, Atty., payable to J. O. Bell, as follows:

One dated Oct. 9th, 1924, No. 16158, for $125.00
One dated Oct. 11th, 1924, No. 16213, for $144.33
One dated Nov. 3rd, 1924, No. 16418, for $125.00

One dated Nov. 5th, 1924, No. 16406 for $83.67
One dated Dec. 2nd, 1924, No. 16814 for $200.00
One dated Jan. 5th, 1924, No. 16877, for $106.03

We also introduce five bills of lading, as our

EXHIBITS 6, 7, 8, 9 AND 10

covering cotton shipped from J. O. Bell Claxton, Ga., to the J. W. Gleason Cotton Co., Savannah, Ga., as follows:

160 6 Seaboard Air Line Railway Company straight non-negotiable bill of lading, dated September 26, 1924, at Claxton, Georgia, showing shipment one bale of cotton from J. O. Bell at that point to J. W. Gleason Cotton Company, Savannah, Georgia.

7 Seaboard Air Line Railway Company straight non-negotiable bill of lading, dated October 6, 1924, at Claxton, Georgia, showing shipment one bale of cotton from J. O. Bell, shipper, to J. W. Gleason Cotton Company, Savannah, Georgia.

8 Seaboard Air Line Railway Company straight non-negotiable bill of lading, dated October 24, 1924, at Claxton, Georgia, showing shipment two bales of cotton from J. O. Bell, shipper to J. W. Gleason Cotton Company, Savannah, Georgia.

9 Seaboard Air Line Railway Company straight non-negotiable bill of lading, dated September 16, 1924, at Claxton, Georgia, showing shipment two bales of cotton from J. O. Bell, shipper to Savannah Cotton Factorage Company, Savannah, Georgia.

10. Seaboard Air Line Railway Company straight non-negotiable bill of lading, dated December 19, 1924, at Claxton, Georgia, showing shipment of three bales of cotton from J. O. Bell, shipper to J. W. Gleason Cotton Company, Savannah, Georgia.

161 Be it further remembered that upon the conclusion of the evidence and after all of the evidence had been submitted, counsel for the defendant requested the Judge to direct a verdict for Defendant against Plaintiff on the first count (which was granted) and also on the second count and third count of petition, upon the following grounds:

On second count because:

It appears without conflict from the evidence that MacDonnell forged and issued the bill of lading and made the representation alleged to cover cotton which did not exist in furtherance of an independent fraudulent scheme planned for his own enrichment and not in furtherance of his master's business, but directly against its interests, the said MacDonnell having no real or apparent authority to issue the bill of lading in question and his act never having been directed, ratified nor approved by the Railroad.

Which motion the Court then and there denied, to which ruling your defendant then and there excepted and now excepts and then and there alleged and now alleges that the same was error because:

The law is that the act of a servant done to effect some independent fraudulent purpose of his own and not with reference to the service in which he is employed nor

in furtherance of his master's business, is held not to be within the scope of his employment so as to render the master liable therefor, even though the act occurs at a time when the facilities afforded to the servant by his relation to the master were used in committing the injury, unless the willful act is authorized to assented to by the master, or unless in the case of carriers the bill of lading has been issued by an employee whose actual or apparent authority includes the re-
162 ceipt of such goods and issuing of bill of lading therefor.

On the third count, because:

(a) The evidence failed to show that other acts of dishonesty of MacDonnell were known to Seaboard Air Line Railway Company prior to perpetration and discovery of the Gleason forgery.

(b) The evidence failed to show that previous acts of MacDonnell were known to the Seaboard Air Line Railway Company on or prior to March 19, 1925.

Which motion the Court then and there refused to make, to which ruling your defendant then and there excepted and assigned as error and now excepts and assigns as error, because:

The evidence taken as a whole shows that the former acts of dishonesty of MacDonnell were only connected with him upon the discovery of the Gleason forgery and the evidence even taken most favorably to plaintiff without considering cross-examination, weight or explanation merely refers to an admission of knowledge that this was known prior to two o'clock p. m. on March 20th,

which was a time subsequent to the perpetration and discovery of the Gleason fraud and a time later than "on or prior to March 19, 1925" as alleged in the pleading of the third count.

(The trial Court on review of the case on a motion for new trial filed and argued, recognizes the insufficiency of this evidence to support a verdict on the Third Count, which order entered of record is as follows: "The foregoing motion for new trial being heard this day it is the opinion of the Court that the evidence is not sufficient to warrant the verdict upon the third count and had the verdict been upon that count alone a new trial would be granted.")

Said motion for direction of verdict as made, ground thereof and opinion of the Court thereon is set forth in "totidem verbis" as hereafter follows:

163 Defendant:

If the Court please, we have a motion which we wish to make and desire to do so out of the hearing of the Jury.

Court:

Very well sir. Mr. Marshall, have the jury retire for a few minutes. (Jury retires.)

Defendant:

If the Court please, we respectfully move for a direction of a verdict for the defendant on the first, second and third counts of the petition.

Court:

Are those the ones that are based upon the fact that MacDonnell as the agent of the Seaboard Air Line Railway Company represented the cotton was on hand?

Defendant:

The first count deals with the estoppal, the second deals with the representation and the third alleges that he was an embezzler prior to this time.

Court:

I don't think that is made out, I don't think the last one is made out. I don't think there was any evidence to warrant their thinking he was an embezzler before that time.

Defendant:

That being the case, I will touch on only the first and second counts, and anything I desire to bring out on the third count I will do in reply to anything they may argue.

164 Court:

Before we pass from that—I do not recollect myself except by a reference made by one of counsel, as to whether or not there was testimony to the effect that the agent of the Seaboard Air Line Railway Company admitted to Mr. McLoughlin, or one of the representatives of the John W. Gleason Cotton Company, that before the occasion of this 110 bales of cotton that they suspected MacDonnell of being a crook, or something to that effect. I do not recall that that testimony was given, but I heard one of your gentlemen say something about that.

Defendant:

On the 20th, at one o'clock, he said that they had this conference, and Mr. Glaiber said, "we now know—

Court:

Of course what he now knows had nothing to do with it. That was my understanding. As long as their [there] is a dispute about the testimony I will leave it to the jury to pass on.

Defendant:

Now, if the Court please, the first count alleges an estoppal and attempts to prove a delivery of the cotton and issuance of bill of lading purely by an estoppal. This Court in its ruling on the demurrer overruled the demurrer to the first count, and in an opinion said that this count alleges actual delivery of the cotton to the defendant carrier, actual issuance of the bill of lading and actual wrong of the defendant in not transporting and delivering the cotton. We respectfully submit—

165 Court:

You say I sustained the demurrer as to that?

Defendant:

No, sir; you overruled the demurrer, using in your opinion that language: "First Count: This alleges actual delivery of the cotton to the defendant carrier, actual issuance by it of a bill of lading and actual wrong of the defendant in not transporting and delivering the cotton." We respectfully submit that that has not been proved.

Court:

Let me have the pleadings. (Reading same.) All right, go ahead.

Defendant:

We respectfully submit that that has not been proved. Now, the estoppal feature of the first count we contend cannot be set up as an estoppal, in view of the law of agency.

Court:

In view of what?

Defendant:

The general rule of the law of agency, that the master is not liable for the torts of his agent, it not in furtherance of the master's business. I will of course enlarge on that and cite my authorities.

The second count, the Court overruled a demurrer to the second count, in which it was demurred to, because we alleged that it was shown in the Count that it was in furtherance of an independent fraudulent scheme.

The Court in overruling that said that had not
166 been shown, it didn't appear in the pleadings.

We respectfully submit now that it is perfectly apparent that this was an independent fraudulent scheme. The Court, in the second count, however, added a provision, that "Even if the agent were so acting, but had been authorized by his principal to give the notice and do the acts alleged, and they were apparently done within the scope of his authority, the principal would be bound." We say that it has been definitely shown that this act was not authorized by the Railroad and that it was not ratified, the fraudulent telephone conversation, and the receipt of the bill of lading.

Court:

You don't mean to say that the principal is not bound by the dishonest act of his agent?

Defendant:

Yes, sir; if it is in furtherance of the master's business. It may be a crooked transaction, but if it is in furtherance of the master's business, or in some way helpful to the master, it may be ratified by the master or it may bind the master.

Court:

How does he know that he is stealing for himself or helping some one else to steal?

Defendant:

He doesn't know, any more than the railroad would be in position to know. On the general proposition of the liability of the agent we beg to cite a few authorities that we have. Now, in support I would cite among other authorities Corpus Juris, page 832, Vol. 2. Now, that particular citation deals with the liability of the principal to third persons in contracts of wrong doing, or an act which an agent has done in the exercise of his authority. In the same authority, dealing with the liability of principal for the torts of the agent, we find that the doctrine is fully covered and that this language is used:

167

"The phrases 'scope of authority' and 'course of employment,' used to express the test of a principal's liability for the acts of his agent, are generally used synonymously, although a distinction has been attempted. Much of the confusion and conflict in the cases is due to the gradual extension of the rule of liability so as to impose liability for acts not authorized and even forbidden, but nevertheless submitted in the transaction of the principal's business, and also to a failure to note the distinction between acts done by an agent within the scope and course of his employment, and acts done merely during his employment. In order to render the principal liable for his agent's torts they must have been committed while carrying out the principal's business; and it may be stated broadly that the tort of an agent is

within the course of his employment where the agent in performing it is endeavoring to promote his principal's business within the scope of the actual or ap-
168 parent authority conferred upon him for that purpose. But if the agent steps aside from the principal's business, for however short a time, to do acts not connected with such business, the relation of agency is for that time suspended, and the agent is not acting within the course of his employment."

And in a decision cited as a foot note, I read:

"The stepping aside by an agent from the scope of his employment, essential to break the connection between the principal and the agent, requires only a change of mental attitude, not particular interval of time being necessary."

There is a Georgia decision which is cited by the Court, the Planters Rice Mill Company vs. The Merchants National Bank of Savannah, Ga., in the 78 Georgia, 574, and we respectfully submit whether or not that case is the law of the State of Georgia, that it is not the Federal law and is not controlling in a case of this kind, which has to do with a shipment where moving in interstate commerce, or which is alleged to have moved in interstate commerce. The Federal rule we respectfully submit is otherwise, and we take the liberty of referring to—well, first of all we refer to that brief which was filed by the plaintiff. The plaintiff admits, or I will say admits, admits prior to the Pomerine Act, the Federal Rule was against the liability of the carrier for an act of this kind. In his brief on page 8 he says:

169 "The question which the demurrer to the first count presents is whether the bills of lading act is to be strictly construed as urged by Mr. Hunter at the bottom of the second page of his brief or whether the Act shall be liberally construed so as to accomplish its objects; whether this Court will hold that Congress only abrogated the final judgment in the Friedlander case and that the principles which establish that judgment must be followed though they destroy uniformity and injure commerce, or whether this Court will hold that the intention of Congress must prevail."

In other words, we say he admits, or practically admits, that that was the rule of law, and that the Federal rule of law as set out in this case, and in many other cases as cited in our brief governs.

Court:

Let me see a copy of my opinion. (Handing copy to the Court.)

Defendant:

Now, we respectfully submit that if that was the Federal rule, and we say that we have ample authorities to sustain that, then that Federal rule still exists and that is still the Federal Law governing relationship of master and agent, or master and servant, principal and agent, except as that rule may have been changed by the bill of lading act, and that, therefore, we have before us really a consideration of how the bill of lading act as applied to carriers changed that relationship, and what case has to be made to come within the scope of the bill of lading act. Now, in reference to the decision in the case of the Planters Rice Mill Company vs. The Merchants National Bank of Savannah, the Georgia Case, in the 78th Geor-

gia, they cite a case from the Circuit Court of Appeals, the case of Harris, Irby & Vose vs. The Allied
170 Compress Co., 6th Federal, second edition, page 9:

"Upon that question, if the case of Planters Rice Mill Company vs. Merchants National Bank, supra, applies to estoppels on fraudulent contracts, it is in direct conflict with the decisions of the Supreme Court of the United States. Under the State rule, the agent would be acting within the scope of his employment, and the principal would be bound; while, under the Federal rule, the agent would be acting without the scope of his employment, and the principal would not be bound."

And the Court cites the cases of The Schooner Freeman vs. Buckingham, 18 Howard 182, 15 L. Ed. 341; Pollard vs. Vinton, 105 U. S. 7, 26 L. Ed. 998; Iron Mountain R. Co. vs. Knight, 122 U. S. 79, 7 S. Ct. 1132, 30 L. Ed. 1077; Friedlander vs. Texas & P. Ry. Co., 130 U. S. 416, 9 S. Ct. 570, 32 L. Ed. 991.

These cases are all cited on our brief. While the Court says, and I won't go into those except to say that Mr. Brannan in his brief admits that the Friedlander vs. Texas & P. Ry. Co. case was the Federal rule. He may differ with me, but that is my conclusion, that that was the rule until the Pomerine Act, or the Bill of Lading Act. These cases we cite are bill of lading cases, practically all of them.

Court:

That was a bill of lading case?

171 Defendant:

No, sir; that was a warehouse case, but the Court in this demurrer cites the Georgia case, which is

criticized in that decision. We say that this is a Federal question, and we take leave to refer to the case of Fitch, Connell & Co. vs. Railroad, 155 N. Y., S. 1079. That was a case that dealt with a fraudulent shipment that was purported to be in interstate commerce, but was not actually in Inter-State Commerce. It is important because New York was one of the few States that followed the minority view, that the principal would be liable for the fraudulent act of its agent, and yet in this New York case it was held—the case was where a station agent issued a false bill of lading, no goods being received—the Court held that an innocent payor of draft had no cause of action. Appellant insisted that this was not a shipment in interstate commerce and that the New York rule should apply, since the very foundation of the defense was that the bill of lading was fraudulent and that no shipment had ever been received. However, the New York Court held that although no shipment had actually moved, yet the bill purported to be for an interstate shipment and, therefore, dealt with an instrumentality of interstate commerce and that the Federal Rule should apply.

Now, the Court we believe in the opinion as to the first Count recognized that fact and held that to come within the exception of the Bill of Lading Act, that actual delivery of the cotton, or the actual issuance of the bill of lading by the agent authorized to issue a bill of lading would have to be shown. The exact exception made in the bill of lading act reads as follows:

172 "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the sev-

eral States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing rights of stoppage in transit, or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue."

Now, we respectfully submit in this case it has been shown that this bill of lading was never issued by the carrier, was never issued by an authorized agent of the carrier, or by an agent who had apparent authority to issue bills of lading. In fact it has been conclusively shown that it was issued in Charleston, S. C., by an agent who had no connection with the Seaboard Air Line Railway Company at that point, was a forgery and did not originate even in the office of the company. Now, admitting, if we admit for the sake of argument, that was the law, that that was the law, Mr. Brennan in his brief—this goes back you might say to the same argument we had before on this question—he says because a bill of lading is given certain negotiable characteristics, that a telephone conversation takes on those same characteristics, and that because a written instrument, which at least has had certain elements of negotiability, or at least really assignable, that because Congress has seen fit to throw around those bills of lading
173 special safe guards, that a telephone conversation with an employee is also by that amendment and that exception clothed with the same power, the same elements of negotiability, and that because Congress has said that if a man who was station agent and who is in apparent authority, with the bills of lading

before him, and who issues them, that the railroad company would be bound, that a man can also bind the railroad irrespective of the Federal rule by that amendment by simply a telephone conversation and memorandum received in the same way, in a case where it is admitted no bill of lading issued within the real or apparent scope of MacDonnell's employment, or any agent employed in Charleston.

Now, the Court quite properly over-ruled our demurrer to the Second Count, and the Court in over-ruling our demurrer said it is not apparent without inferring that disposition by MacDonnell to perfect some fraudulent independent scheme of his own, it is not apparent who issued it. But now that is undisputably stated. We, therefore, say that a case has not been made out, in the First Count, from the actual issuance of a bill of lading by an agent in authority. That the decisions of the Federal Court, which are controlling, say that an estoppel will not lie to bind a principal for the tort of its servant, nor in furtherance of the master's duty not within the scope of his employment. And on
174 the Second Count, now that we have shown this was a fraudulent transaction, the same law would apply that we applied to the First Count, and the evidence has not shown that either of these counts were brought within the exception of the bill of lading act.

Now, may it please the Court, as far as the Third Count is concerned, we contend, and we have argued these separately, because in the First and Second Count the law is about the same, but as far as the Third Count is concerned they allege that prior to March 19th, 1925, these acts took place, and that on that date, on March 19th, they state:

"That prior to March 19th, 1925, the said MacDonnell has become corrupt and dishonest, and has stolen numerous bales of cotton from the said defendant and forged bills of lading, all of which was, on the said date, known to the defendant." That "all of which was, on the said date, known to the defendant." Now, then, in the amendment it is set out that it was known through the agents Glaiber and Moyland. Now, we respectfully submit that it has not been shown by the evidence that on March 19th the railroad company had that knowledge. At most it has been very hazily testified to that on the 20th, at one o'clock p. m., Mr. Glaiber and Mr. Moyland said "we now know MacDonnell must have done these other acts and we will connect it all up now." To have made it possible for it to have come within the knowledge of the Seaboard Air Line Railway Company, definite knowledge, not suspicion, but definite
175 knowledge upon which they could act, it would have had to have been known, as is alleged in the plaintiff's amendment, before nine o'clock a. m. on March 20th. That is the time that the plaintiff says:

"The said draft and bill of lading were held by the Citizens & Southern Bank of Savannah for collection only and no bank or any other person had made advances upon them nor had any interest in them and this plaintiff, at any time prior to 9 a. m., March 20, 1925, when the said Ten Thousand ($10,000.00) Dollars was delivered to the said Tillman, could have stopped payment and delivery of the said amount and recalled the same."

Now, there is no evidence that that was known prior to nine o'clock a. m. on March 20th. At best, even construing it in the best light, the only evidence is that they know it now, by the developments of these subsequent

facts, and even if as they say there is an estoppel, there is still no evidence that prior to nine o'clock on that date they knew it or were in position to act. The telephone conversation was referred to, and these other acts were subsequent to that time, at ten, eleven and twelve o'clock during that day. We, therefore, respectfully submit that a verdict should be directed for the defendant also on the third count.

That is our case.

176 Plaintiff:

May it please the Court, in this case Mr. Doolan's testimony is positive that on the 20th about one o'clock Mr. Glaiber and Mr. Moyland, being at the time in the office of the John W. Gleason Cotton Company, then said that previous to this time they had sufficient knowledge to have arrested Mr. MacDonnell. That is Mr. Doolan's testimony, and positive testimony, that the statement was made at one o'clock on the 20th, that prior to this happening they had sufficient evidence to arrest MacDonnell.

Court:

Under cross examination as well as direct examination there has been no evidence at all of any fact that came to the attention of the Seaboard Air Line Railway Company prior to the particular transaction in question which would warrant a belief that this man MacDonnell was crooked?

Plaintiff:

I can answer that by the last of their witnesses, who was put back on the stand, Mr. Glaiber, as I recall, testified that his agent on the 18th, after being in the office of the Gleason Cotton Company, and getting this

information about the Bell cotton, went to Claxton, which was 50 miles away, and had a telephone, and he found out no cotton had moved under these bills of lading and that they were forged, and the Seaboard Air Line Railway Company on the 19th knew that.

177 Court:

How would that warrant—

Plaintiff:

Mr. MacDonnell was a cotton clerk in Savannah, and somebody here in the railway's employ had to steal three bales of cotton and ship them in.

Court:

Why not suspect all of them?

Plaintiff:

Mr. MacDonnell was in charge?

Court:

There is no evidence that MacDonnell had anything to do with it, except the evidence of one witness on the stand that MacDonnell was the man that stole it. They knew before the 19th or before the 20th?

Plaintiff:

They knew on the 19th that the bills of lading had been forged and that somebody had stolen this cotton and sent it in to the John W. Gleason Cotton Co. They don't show where they got this additional information; they don't produce anything from the records to show whether they knew this fact.

Court:

You are charging the fact that they knew, the burden is on you?

Plaintiff:

I show by positive evidence they admit one of the transactions, that they knew, that they knew prior to this happening that MacDonnell had committed this forgery. That is an admission. They produce a single record of theirs to show now whether or not they knew or whether they came after this, but simply content themselves with a general statement. I submit that is sufficient to make a conflict to go before the jury on that question.

178 There is positive testimony from Glaiber that they made these admissions, that there was a forgery, and they don't show where they got this other information.

Court:

Let me direct your attention on the first Count with this view: There is no claim that it was not within the scope of MacDonnell's authority that the bill of lading should be issued by him?

Plaintiff:

If your Honor please, we have been over that twice before. We went to Augusta and argued the case fully and we came back and we submitted very lengthy briefs, and Mr. Hunter submitted one in conclusion. It was a case with points involved in it which we didn't think we could do justice to in an oral argument at that time. Your Honor gave the matter very careful consideration. We cited case after case, numerous authorities in point, and any point that could be made then was made then, and can be made hereafter in arrest of judgment. There

is not a single point that cannot be made hereafter. We have re-argued the whole thing, and we cannot do justice to the law of the case now without my authorities, and it would take a couple of hours now to rehash the whole thing.

Court:

That was on the pleadings. What evidence is there—it seems to me if we devoted so much time to it before we may in conversation here elucidate the matters. What is there in the first count of the petition that shows there was any actual or delegated authority from the Seaboard Air Line Railway Company to
179 MacDonnell to issue the bill of lading?

Plaintiff:

We don't allege there was, and never have we claimed the Seaboard Air Line Railway Company is estopped.

Court:

Merely by the statement of MacDonnell that the cotton was on hand?

Plaintiff:

That is one of the alleged points of estoppel.

Court:

What else now do you claim that he did in the scope of his definite authority?

Plaintiff:

He notified us that the cotton was on hand, and the giving of this receipt for the bill of lading to us.

Court:

How did he know, as far as the evidence goes, or any authority he had, would he know that was the bill of lading issued?

Plaintiff:

We are now claiming it was a forgery. We say he gave us the bill of lading for it.

Court:

Let's come down to the facts. Did he misrepresent as to the 110 bales of cotton? It is not denied. You have evidence to sustain you in that view, that he was put there to represent to the patrons of the road whether their cotton was on hand, and that was done within the apparent scope of his authority. Anything in
180 that action would estop the railroad, but the issuance of a receipt to you for the bill of lading you had from some source not known to him in the course of his position as cotton agent, how does that represent to you as to whether the bill of lading was bona fide?

Plaintiff:

We could have stopped payment on this draft at any time until the 20th. He gave us a receipt for the bill of lading on this particular cotton. Besides that if I draw a check to a customer on a bank it must recognize the signature of the customer at its peril, or its own signature at its peril. We present the bill of lading, they accept it as a genuine bill of lading and give us a receipt for it as a genuine bill of lading, and on the strength of that we remit $10,000 of our money to pay the draft.

Court:

There is no dispute about the question of a receipt; there is no dispute that was in line with his authority, but there is no evidence at all that he was authorized to issue a bill of lading, and the evidence here is that he did issue the bill of lading, not apparently even as a part of his duty with the Seaboard Air Line Railway Company.

181 Plaintiff:

We are not alleging that the issuance of the bill of lading was any part of his duty, but giving the receipt at Savannah for the bill of lading in order to have the cotton transported from the Island to the John W. Gleason Cotton Company's warehouse was a part of his duty.

Court:

Suppose there was a bill of lading forged, not by Mr. MacDonnell, but by somebody else? Suppose there had been on inquiry made of MacDonnell of what cotton was on hand, but simply that the Gleason Cotton Company had sent over there a bill of lading, and said "here is your bill of lading, now give me a receipt for it." Here is a bill of lading that is apparently all right, and I give you a receipt for the bill of lading. He didn't receipt it as good, bad or indifferent, he said simply "I give you a receipt for it." Would you think that was an estoppel on the Seaboard Air Line Railway Company from denying the forgery?

Plaintiff:

Yes, sir; the advance sheets of the Supreme Court have held that a draft being presented to the Treasurer and having been paid through the Treasury, is estopped

from denying the genuineness of the person's signature, that it is bound at its peril to recognize the genuineness of this signature. The same way with all checks and drafts presented the bank, and notes. We allege that this is sufficient to constitute an estoppel and your Honor has ruled it is a jury question, whether or not they are sufficient, and in view of these facts
182 we submit that the question should be submitted to the jury. Your Honor had ruled that these questions are matters for the jury to decide.

Court:

You are leaving the pleadings?

Plaintiff:

No, sir; your Honor's opinion mentioned this particular paragraph and said that should be left for the jury whether these facts are sufficient to constitute an estoppel. We submit that the evidence in this trial falls squarely within your Honor's ruling, and before rehashing these matters that your Honor has ruled upon I would like to get my decisions—

Court:

We will not do that. The Court is of the opinion that in as much as the First Count alleges the actual receipt of the cotton and the actual issuance of the bill of lading, and now it is developed by agreed statement of facts that there was no cotton received, and that there was no bill of lading issued by the railroad authorities; and that there is no claim whatever that MacDonnell had any authority to issue a bill of lading in behalf of the Seaboard Air Line Railroad; the fact that he had thus fraudulently forged a bill of lading and issued it and worked up this scheme, and the fact that he sub-

sequently acted within the scope of his apparent authority, and did misrepresent that there were
183 110 bales of cotton on hand, would not estop the Seaboard Air Line Railway from contending that there was no receipt of cotton and that there was no bill of lading.

The Second Count, however, is very different. I think the Second Count is based upon a theory that there is ample evidence to sustain, that is, that the Seaboard Air Line Railway's agent had a duty upon him, that it was a part of the method of conducting business for the Seaboard Air Line Railway to report whether or not cotton was actually in the posession of the Railway. If the people doing business with the Seaboard Air Line Railway could not rely upon the action of this agent there probably would have been a cessation of business. There is no reason to anticipate under the evidence that any person would have paid for cotton—paid a draft with order notify bill of lading attached—until they had been assured by the representative of the Seaboard Air Line Railway Company, duly authorized to give this information, that the cotton was on hand. The evidence in this case is definite that the payment would not have been made, independent of this apparently valid bill of lading; that the draft would not have been paid if it were not for the misrepresentation on the part of the man who was put there by the Seaboard Air Line Railway to state that the cotton was on hand. And I think the Seaboard Air Line Railway is responsible for the wrongful act on the part of its agent, done in the scope of his duty.

Now, as to the third Count, it may be there
184 is a shadow of evidence, based as far as I know on the one statement of the one witness, which I think, (without any imputation of dishonesty on his

part), might have been readily due to misunderstanding, that the facts and circumstances—coupled with the revelations disclosed before the 20th, or coupled with those disclosed on the 20th—were sufficient to authorize the conclusion that the Seaboard people might have readily found out that MacDonnell had been crooked, in fact. I don't think there is any other evidence to warrant the conclusion. I will let that go to the jury on the Third Count, just because there is that one statement, which personally I don't think sufficient to sustain a verdict.

If you have any exceptions to make you can have them noted.

Defendant:

We respectfully except to the ruling of the Court failing to direct a verdict for the defendant on the second and third counts.

Plaintiff:

Please note our exception to the ruling of the Court on the First Count.

185 Be it further remembered that then and there and before the Court commenced the charge to the Jury, the Defendant submitted and filed in writing a request to the Court to charge certain principles of law as will be more particularly hereinafter set out.

Be it further remembered that this Honorable Court then and there gave in charge to the jury the following law as applicable to the issues joined:

186 CHARGE OF COURT.

(Title Omitted.)

Gentlemen of the Jury, you will have with you in your jury room the pleadings represented by the petition, (and that is embodied in a transcript that comes from the State Court, this case having originated in the State Court, this petition and several amendments to the petition) and the answer of the defendant. You will find the petition is divided into three counts, so called. I will briefly state the substance of them without undertaking to quote them exactly.

The First Count you will find based upon the theory that the Seaboard Air Line Railway Company actually received one hundred and ten bales of cotton from one Tillman to be shipped to the Plaintiff at Savannah, that a bill of lading was issued for that one hundred and ten bales of cotton, and that by reason of the actions of the agent of the Seaboard Air Line Railway, Mr. MacDonnell, at Savannah, Ga., the Seaboard Air Line Railway is estopped from denying the fact of the receipt of the cotton and its failure to deliver the cotton. I have granted a motion that you find a verdict in behalf of the defendant on that Count. Let us get that straight —on the count that sets up an estoppel by reason of such facts you are directed to return a verdict for the defendant, that is, the Seaboard Air Line Railway Company. Briefly stated the reason leading me to
187 that conclusion, (while it is not necessary to give you any reason) is that the action of the Company, (as has been outlined to you very strongly by Mr. Hartridge in his statement to you) must be done by some agent, whether he is President or what not, within the scope of his authority, and an agent is not supposed

to bind the company in some action is beyond the scope of his authority or apparent authority. There is no evidence in this case that establishes the fact, or that seems to even approach the establishment of the fact, that Mr. MacDonnell had any authority to issue a bill of lading. And while it is proven here that Mr. MacDonnell did irregularly issue a bill of lading, forged it, and thereafter it was represented that the Seaboard Air Line Railway Company had received it, still MacDonnell is not claimed to have been the agent of the Seaboard Air Line Railway for the purpose of issuing bills of lading, and there is no evidence in my opinion that would estop the Seaboard Air Line Railway from denying the issuance of the bill of lading or the receipt of the cotton. So, you may disregard that in your dealings with this case, except when you write your verdict. On the First Count you write a verdict in behalf of the Defendant, regardless of what you do on the other counts.

The Second Count is upon this theory: That the cotton merchants of Savannah, who handle cotton coming in over the Seaboard Air Line Railway Com-
188 pany, which has its terminals across the river, are not willing to pay the drafts covered by the Order Notify Bills of Lading until they have been assured that the cotton itself has been received by the Seaboard Air Line Railway at its Terminals in Savannah, and that that custom was known to the Seaboard Air Line Railway Company, and that the Seaboard Air Line Railway Company in order to do business with the cotton merchants of Savannah created an agency in the person, at this particular time, of Mr. MacDonnell, who was authorized to act for the Seaboard Air Line Railway Company in stating to the customers, the cotton customers, that the cotton was or was not, as the case may be, on the Terminals in Savannah, with the knowledge on

his part and the part of the Railway Company that payments for the cotton would be based upon the representation that the cotton was actually there.

The Third Count is based upon the theory that the Seaboard Air Line Railway Company knew on the 18th of March, 1925—or is the 19th of March what they said?

Defendant:

Prior to the 19th is what they said.

Court:

Yes, that they knew prior to the 19th day of March, 1925, being the day that the alleged actions of Mr. MacDonnell were taken, that Mr. MacDonnell was dishonest and that the Railway Company was negligent in permitting a man of this known dishonesty to act in that capacity, and that having such knowledge as
189 to MacDonnell that the Seaboard Air Line Railway Company would be responsible for that act of negligence.

I will not undertake to analyze the evidence. That has been done by counsel. I won't undertake to analyze any of the particulars, but I charge you that you gentlemen of the jury are the sole judges of the evidence, you know what you believe and don't believe, and it is for you to make your own conclusions. If counsel or the Court have intimated any opinion as to what has or has not been proven you are not to be controlled by that. I don't mean you are to disregard the effectiveness of counsel's argument on both sides, but you are the judges of the credibility of the witnesses. You take the law from me, whether it be good law or bad law; that is my responsibility, and if you don't take the law as given by me and apply it to the facts as you think have been proven, you will get into all kinds of difficulties. Your

verdict, whatever it may be, may be entirely misconstrued, if you do not apply the law as given by me to the facts that you find have been shown. If you try to apply some other rule of law to these facts the implication of your verdict would necessarily be erroneous.

The burden is on the Plaintiff to prove by a preponderance of the evidence the essential allegations of the petition. In the one part of the case before
190 you, that is, Count Two, it will be necessary to prove—in fact some of it is not disputed—the different cotton transactions in Savannah—it will be necessary to prove that Mr. MacDonnell was the agent, and that this statement of his, which is not denied, that the 110 bales of cotton were actually on hand at the Savannah Terminals in Savannah, and that he made that statement, and that was within the scope of his authority, and that the ten thousand dollars was paid only after the assurance that the cotton had arrived and was there under this bill of lading, and that after such assurance was given the ten thousand dollars was actually paid. If you find that is true it will be your duty to find a verdict for the Plaintiff. And so it is if you find that prior to March 19th, 1925, that the Seaboard Air Line Railway knew that this man MacDonnell was crooked and still continued to employ him, that would be an act of negligence, for which it would be responsible for a misrepresentation of fact, if it was so made, and the payment of this money was based on that and caused by that.

The amount of your verdict may be one of two figures. It may be either for ten thousand dollars, if you find for the Plaintiff, or if you find that the plaintiff is entitled to additional damage by reason of being kept out of its money during the period from then until now, you can

not find the ten thousand dollars plus interest,
191 or you cannot find a verdict for $10,000 plus $1340.00 interest, as such, though that would be the amount of interest at seven percent up to the time of this trial, but if you think it proper, and of course I mean if you find a verdict for the plaintiff at all, you may write it in a lump sum, or instead of $10,000 it would be $11,340, or ten thousand dollars plus whatever interest amounts to, or damage I may properly say, for you cannot find any interest. If you find any other element of damage that has accrued to the plaintiff by reason of the alleged wrong you might increase the amount from $10,000 to such other amount as you think proper, not exceeding, however, $11,340.00.

If you find for the plaintiff in Count Two and Count Three, you will say, we the jury, find for the plaintiff, (writing your verdict out) on Count Two and Count Three. If you find a verdict for the plaintiff on Count Two and not Count Three, you write your verdict, "We, the Jury, find for the plaintiff on Count Two," if you so find, and for the defendant on Count Three, or if it be the reverse of that, for the defendant on Count Two, and for the plaintiff on Count Three. If you find against the plaintiff altogether the form of your verdict would be, "We, the Jury, find for the defendant."

Defendant:

If the Court please, may I note some exceptions to the Charge?

Court:

Certainly, go ahead.

192 Defendant:

We except in behalf of the defendant first to the Court's charge as to the elements which if found

would constitute a verdict for the plaintiff in the second count. We except to the failure of the Court to charge the first paragraph of our request.

Court:

All your requests I have numbered them, you may just note the exceptions you have made to my refusal to charge. Here your requests are marked.

Defendant:

All right, sir; I except to all of these that the Court failed to charge.

193 Be it further remembered that then and there before the jury retired and in the presence of the Court and jury the Defendant excepted to the charge of the Court and then and there took six (6) specific exceptions to said charge as follows:

1st. Because the Court charged the following to which counsel for Defendant then and there excepted in the presence of the jury and before the case was finally submitted by the Court to the jury, which exception was then duly noted and allowed:

"In the one part of the case before you, that is Count Two, it will be necessary to prove—in fact some of it is not disputed—the different cotton transactions in Savannah—it will be necessary to prove that MacDonnell was the agent, and that this statement of him, which is not denied, that the 110 bales of cotton were actually on hand at the Savannah terminals in Savannah, and that he made that statement, and that was within the scope of his authority, and that the $10,000.00 was paid only after the assurance that the cotton had arrived and was

there under this bill of lading and that after such assurance was given the $10,000.00 was actually paid. If you find that is true it will be your duty to find a verdict for the Plaintiff."

2nd. Because the Court failed to instruct the jury, having been requested by the Defendant in writing before the charge to the jury began, the following rule of law, to which failure the Defendant then and there excepted in the presence of the jury and before it retired, which exception was noted and allowed:

"Issues Count 2. The act of a servant done to effect some independent fraudulent purpose of his own and not with reference to the service in which he is employed nor in furtherance of his master's business is held not to be within the scope of his employment so as to render the master liable therefor even though the act occurs at a time when the facilities afforded to the servant by his relation to the master were used in committing the injury, unless the willful act is authorized or assented to by the master."

3rd. Because the Court failed to instruct the jury, having been requested by the Defendant in writing before the charge to the jury began, the following rule of law, to which failure the Defendant then and there excepted in the presence of the jury and before it retired which exception was noted and allowed:

194

"Issues Count 2. To the foregoing rule of law there is an exception that if a bill of lading has been issued by a carrier or on his behalf by an agent or employee, the scope of whose actual or apparent authority includes

the receiving of goods and issuing of bills of lading therefor for transportation in commerce among the several states and with foreign countries, the carrier shall be liable to the holder of an order bill who has given value in good faith relying upon the description therein of the goods for damages caused by the non-receipt by the carrier of all of part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue."

4th. Because the Court failed to instruct the jury, having been requested by the Defendant in writing before the charge to the jury began, the following rule of law, to which failure the Defendant then and there excepted in the presence of the jury and before it retired, which exception was noted and allowed:

"Issues Count 2. There is a distinction between acts done by an agent within the scope and course of his employment and acts done merely during his employment. In order to render the principal liable for his agent's torts, they must have been committed while carrying out the principal's business; and it may be stated broadly that the tort of an agent is within the course of his employment where the agent in performing it is endeavoring to promote his principal's business within the scope of the actual or apparent authority conferred upon him for that purpose, but if the agent steps aside from the principal's business for however short a time to do acts not connected with such business, the relation of agency is for that time suspended, and the agent is not acting within the course of his employment."

5th. Because the Court failed to instruct the jury, having been requested by the Defendant in writing before

the charge to the jury began, the following rule of law, to which failure the Defendant then and there excepted in the presence of the jury and before it retired, which exception was noted and allowed:

195 "Issues Count 2. The stepping aside by an agent from the scope of his employment essential to break the connection between the principal and the agent requires only a change of mental attitude no particular interval of time being necessary."

6th. Because the Court failed to instruct the jury, having been requested by the Defendant in writing before the charge to the jury began, the following rule of law, to which failure the Defendant then and there excepted in the presence of the jury and before it retired, which exception was noted and allowed:

"Issues Count 2. For the Plaintiff to recover in this case on the second count of his petition, provided this fraud was perpetrated as alleged by Defendant, you must find that bill of lading in this case was actually issued by an employee whose actual or apparent authority included the receiving of goods and issuing of bills of lading at point where issued."

Be it further remembered that the jury then and there retired and returned a verdict as has hereinbefore been set out which was made the judgment of the Court.

And now during the term at which said cause was tried and within the time allowed by law, the Defendant, the Seaboard Air Line Railway Company presents this its Bill of Exceptions in this case and prays that same

may be settled and allowed and signed and certified by the Judge in this case as a part of the record thereof as provided by law.

ANDERSON, CANN AND CANN,
J. RANDOLPH ANDERSON,
CONNERAT AND HUNTER,
E. ORMONDE HUNTER,
Attorneys for Defendant.

196 Due service of the foregoing Bill of Exceptions is hereby acknowledged. There are no exceptions to same.

This 26th day of April, 1927.

HARTRIDGE, WRIGHT & BRENNAN,
Attorneys for Plaintiff.

ORDER CERTIFYING BILL OF EXCEPTIONS.

The foregoing Bill of Exceptions having been duly served upon Counsel for Plaintiff and they being now in Court and there being no objections to same and they consenting to this order, and the Bill of Exceptions appearing true and timely presented, therefore,

It is ordered and adjudged, that said Bill of Exceptions is hereby settled and allowed as the true Bill of Exceptions in this case and the same is now and here certified by the undersigned, the trial Judge, according to the statute in such cases made. Let the said Bill of Exceptions and this order be filed as a part of the record in this case.

In open Court, this 26 day of April, 1927.

WM H. BARRETT,
Judge of the United States
District Court.

197 ASSIGNMENT OF ERRORS.

(Title Omitted.)

Now comes the Seaboard Air Line Railway Company, Plaintiff in Error, in the above entitled case, and in connection with its petition for writ of error in this cause, assigns the following errors, which Plaintiff in Error avers occurred on the trial thereof and upon which it relies to reverse the judgment entered therein as appears of record:

1. The Court erred in refusing to direct a verdict for Defendant on Count Two of said petition, because:

It appeared without conflict from the evidence that MacDonnell forged and issued the bill of lading and made the representation over the telephone to cover cotton which did not in fact exist, in furtherance of an independent fraudulent scheme planned for his own enrichment and not in furtherance of his master's business but directly against its interests, the said MacDonnell having no real or apparent authority to issue the bill of lading in question and his act never having been directed, ratified, nor approved by the Railroad; the law being that the act of a servant done to effect some independent fraudulent purpose of his own and not with reference to the service in which he is employed

198 nor in furtherance of his master's business, is not within the scope of his employment so as to render the master liable therefor, even though the act occurs at a time when the facilities afforded the servant by his relation to the master were used in committing the injury unless the willful act is authorized or assented to by the master, or unless in the case of carriers the

bill of lading has been issued by an employee whose actual or apparent authority includes the receipt of such goods and issuing of bills of lading therefor.

2. The Court erred in refusing to direct a verdict for the Defendant on Count Three, because:

(a) The evidence failed to show that other acts of dishonesty of MacDonnell were known to the Seaboard Air Line Railway Company prior to perpetration and discovery of the Gleason forgery.

(b) The evidence failed to sustain the allegation of Count Three that previous acts of MacDonnell were known to the Seaboard Air Line Railway Company on or prior to March 19, 1925.

(c) The evidence showed that knowledge of prior dishonest acts of MacDonnell came to the Seaboard after March 19, 1925, and only when the Gleason forgery was discovered and connected with MacDonnell.

3. The Court erred in charging the jury the following law which was then and there duly excepted to, which exception was duly noted and allowed:

"In the one part of the case before you, that is Count Two, it will be necessary to prove—in fact some of it is not disputed—the different cotton transactions in Savannah—it will be necessary to prove that MacDonnell was the agent, and that this statement of him, which is not denied, that the 110 bales of cotton were
199 actually on hand at the Savannah terminals in Savannah, and that he made that statement, and that was within the scope of his authority, and that

the $10,000.00 was paid only after the assurance that the cotton had arrived and was there under this bill of lading and that after such assurance was given the $10,000.00 was actually paid. If you find that is true it will be your duty to find a verdict for the Plaintiff."

The error in said charge being:

(a) It amounted to the direction of a verdict for the Plaintiff on Count Two.

(b) It excluded from the jury the contention of Defendant that the tort of the servant was a willful one against the Company's interests for which the Company would not be liable.

(c) It failed to instruct the jury that for an act to be within the scope of employment it must be for the purpose of furthering the master's business.

(d) It failed to properly distinguish between "apparent scope of authority" and the legal definition of "scope of authority" sufficient to make the master liable for the act of his servant or agent.

4. The Court erred upon timely written request by the Plaintiff in Error in not charging the jury on Count Two as follows:

"The act of a servant done to effect some independent fraudulent purpose of his own and not with reference to the service in which he is employed nor in furtherance of his master's business is held not to be within the scope of his employment so as to render the master liable therefor even though the act occurs at a time when the facili-

ties afforded to the servant by his relation to the master were used in committing the injury, unless the willful act is authorized or assented to by the master."

To which refusal Plaintiff in Error then and there excepted and now excepts and assigns the same as error for the following reason:

200 Because the same was a correct statement of a principle of law applicable to the issues joined, being in fact the main defense of Defendant to Count Two of the action which said defense was fully supported by the evidence offered.

5. The Court erred upon timely written request by the Plaintiff in Error in not charging the jury on Count Two as follows:

"To the foregoing rule of law there is an exception that if a bill of lading has been issued by a carrier or on his behalf by an agent or employee, the scope of whose actual or apparent authority includes the receiving of goods and issuing of bills of lading therefor for transportation in commerce among the several states and with foreign countries, the carrier shall be liable to the holder of an order bill who has given value in good faith relying upon the description therein of the goods for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue."

To which refusal Plaintiff in Error then and there excepted and now excepts and assigns the same as error for the following reason:

Because the same was a correct statement of a principle of law applicable to the issues joined, which said defense was fully supported by the evidence offered.

6. The Court erred upon timely written request by the Plaintiff in Error in not charging the jury on Count Two as follows:

"There is a distinction between acts done by an agent within the scope and course of his employment and acts done merely during his employment. In order to render the principal liable for his agent's torts, they must have been committed while carrying out the principal's business; and it may be stated broadly that the tort of an agent is within the course of his employment where the agent in performing it is endeavoring to pro-
201 mote his principal's business within the scope of the actual or apparent authority conferred upon him for that purpose, but if the agent steps aside from the principal's business for however short a time to do acts not connected with such business, the relation of agency is for that time suspended, and the agent is not acting within the course of his employment."

To which refusal Plaintiff in Error then and there excepted and now excepts and assigns the same as error for the following reason:

Because the same was a correct statement of a principle of law applicable to the issues joined, which said defense was fully supported by the evidence offered.

7. The Court erred upon timely written request by the Plaintiff in Error in not charging the jury on Count Two as follows:

"The stepping aside by an agent from the scope of his employment essential to break the connection between the principal and the agent requires only a change of mental attitude no particular interval of time being necessary."

To which refusal Plaintiff in Error then and there excepted and now excepts and assigns the same as error for the following reason:

Because the same was a correct statement of a principle of law applicable to the issues joined, which said defense was fully supported by the evidence offered.

8. The Court erred upon timely written request by the Plaintiff in error, in not charging the jury on Count Two as follows:

"For the plaintiff to recover in this case on the second count of his petition, provided this fraud was perpetrated as alleged by defendant, you must find that bill of lading in this case was actually issued by an employee whose actual or apparent authority included the receiving of goods and issuing of bills of lading at point where issued."

202 To which refusal Plaintiff in Error then and there excepted and now excepts and assigns the same as error for the following reason:

Because the same was a correct statement of a principle of law applicable to the issues joined, which said defense was fully supported by the evidence offered.

9. For the reason that the verdict rendered by the jury and the judgment entered thereon were contrary to law and the evidence and were erroneous and should, therefore, be set aside.

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Wherefore, for each of the reasons set forth, the Seaboard Air Line Railway Company, now Plaintiff in Error, prays that judgment of the District Court be reversed, that the verdict and judgment rendered against it be set aside, and that judgment be rendered in its favor.

ANDERSON, CANN & CANN,
J. RANDOLPH ANDERSON,
CONNERAT & HUNTER,
Attorneys for Seaboard Air Line Railway Company, Plaintiff in Error.

SERVICE OF ASSIGNMENT OF ERRORS.

Service of the foregoing assignment of errors is hereby acknowledged, copy received and other or further service waived.

This 26th day of April, 1927.

HARTRIDGE, WRIGHT & BRENNAN,
Attorneys for Plaintiff (Defendant in Error.)

Assignment of Error. Filed in office April 26, 1927

203 PETITION FOR WRIT OF ERROR.

(Title Omitted.)

To the Honorable William H. Barrett, Judge of the District Court aforesaid:

Now comes, Seaboard Air Line Railway Company, a corporation, Defendant in the above stated case, by its Attorneys at Law, Anderson, Cann & Cann and Conner at & Hunter, and respectfully shows that on the 24th day of February, 1927, the jury duly impaneled in the above stated case found and returned a verdict in favor of Plaintiff, John W. Gleason as aforesaid, and against your petitioner in the sum of Eleven Thousand Three Hundred Forty ($11,340.00) Dollars and upon said verdict a final judgment was entered on the 25th day of February, 1927, against your Defendant, Seaboard Air Line Railway Company for the sum aforesaid.

Your petitioner, feeling itself aggrieved by the said verdict and judgment entered thereon as aforesaid, herewith petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that a writ of error do issue, that an appeal in its behalf to the United States Circuit Court of Appeals aforesaid, sitting at New Orleans, Louisiana, in
204 said Circuit, for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law

directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

ANDERSON, CANN & CANN,
CONNERAT & HUNTER,
Attorneys for Plaintiff in Error.

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205 SUPERSEDEAS BOND

(Title Omitted.)

Know all men by these presents that we, Seaboard Air Line Railway Company, a corporation of the states of Virginia, North Carolina and South Carolina, and the National Surety Company, a corporation of the State of New York, as Surety, are held and firmly bound unto John W. Gleason, trading as John W. Gleason Cotton Company, in the full and just sum of Thirteen Thousand ($13,000.00) Dollars, to be paid to the said John W. Gleason, trading as John W. Gleason Cotton Company, his attorneys, successors, administrators, executors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed, sealed and dated this 26th day of April, A. D. 1927.

Whereas, lately at a regular term of the District Court of the United States for the Southern District of Georgia, Savannah Division in a suit pending in said Court between John W. Gleason, trading as John W. Gleason Cotton Company, as plaintiff and the Seaboard

Air Line Railway Company, as defendant, cause number #1595, on the Law Docket of said Court, final judgment was rendered against the said Seaboard Air Line Railway Company for the sum of Eleven Thousand Three Hundred Forty ($11,340.00) Dollars, with interest from the 25th day of February, A. D. 1927, at the rate of seven Per Cent (7%) per annum and all costs of Court and future costs and the said Seaboard Air Line Railway Company has obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court
206 to reverse the judgment of the said Court in the aforesaid suit, and a citation directed to the said John W. Gleason trading as John W. Gleason Cotton Company, Defendant in Error, citing him to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit to be holden at New Orleans, in the State of Louisiana, according to law, within Thirty (30) days from the date hereof.

Now the condition of the above obligation is such that if the said Seaboard Air Line Railway Company shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain of full force and virtue.

SEABOARD AIR LINE
RAILWAY COMPANY,
By J. RANDOLPH ANDERSON,
Its Attorney of Record
NATIONAL SURETY
COMPANY,
By CHAS. F. POWERS,
Res. Vice-Pres. & Atty. in fact.

(Seal of Surety Company.)

The above bond is satisfactory to us. This 26th day of April, 1927.

HARTRIDGE, WRIGHT & BRENNAN,
Attorneys for John W. Gleason Trading as, etc.

The foregoing bond presented, same is approved and ordered filed.

This 26th day of April, 1927.

WM. H. BARRETT,
United States District Judge.

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207 ORDER ON PETITION AND SUPERSEDEAS

(Title Omitted.)

Now on this the 26th day of April, 1927, comes the defendant, Seaboard Air Line Railway Company, by its attorneys at law and files and presents herewith to the Court and to the Judge who presided in said cause, its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record and the proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit and that such other and further proceedings may be had as are proper in the premises.

And it further appearing that defendant tenders herewith a bond in the sum of Thirteen Thousand Dollars ($13,000) conditioned as the law directs and approved by the attorneys for John W. Gleason aforesaid.

On consideration whereof, the Court does allow the writ of error and approve the said supersedeas bond in the sum of Thirteen Thousand Dollars ($13,000) ordering that the same be filed, upon which all other and further proceedings in this case be and are hereby suspended and stayed until the determination of the
208 said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit.

In open Court this 26th day of April, 1927.

WM. H. BARRETT,
United States District Judge.

Service of the foregoing Writ of Error is hereby acknowledged, copy received and all other or further service is hereby waived.

This 26th day of April, 1927.

HARTRIDGE, WRIGHT & BRENNAN,
Attys. for Plaintiff.

Indorsement: C. L. 1595. Petition for Writ of Error Order thereon and Supersedeas Bond. Filed in Office April 26, 1927. Margaret Clarke, Deputy Clerk.

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209 PRAECIPE.

(Title Omitted.)

To the Clerk of the above entitled Court:

You will please prepare a transcript of the record in this case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth

Circuit under the writ of error heretofore allowed in this case and to include in said transcript the following pleadings, proceedings and papers on file, to-wit:

(1) Petition filed to the City Court of Savannah on the 19th day of October, 1925, together with process and return of service.

(2) Petition for removal, removal bond, notice of intention to file said petition for removal, acknowledgment of service thereon and order of removal.

(3) Amendments to Petition filed 15th day of October, 1926, and order allowing same, 1st day of November, 1926, and order allowing same and 23rd day of February, 1927 and order allowing same.

(4) Defendant's Answer.

(5) Verdict of the Jury.

(6) Judgment of the Court.

(7) Bill of Exceptions filed by defendant together with entry of opposing counsel approving same and order of Court allowing and settling same.

210 (8) Assignment of errors.

(9) Petition for writ of error, the supersedeas bond and the order allowing the writ of error and approving the bond.

(10) The writ of error, with acknowledgment of service thereon.

(11) The citation, with acknowledgment of service thereon.

(12) This praecipe, with agreement of counsel for Defendant in Error.

(13) Entries of filing on each of the portions of the record above described and transmitted in their proper order.

(14) Certificate of the Clerk.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Fifth Circuit.

ANDERSON, CANN & CANN,
CONNERAT & HUNTER,
Attorneys for Defendant (Plaintiff in Error.)

We acknowledge service of the foregoing praecipe and agree that it contains all the essential parts of the record in the foregoing case necessary to be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit.

This 6th day of May, 1927.

HARTRIDGE, WRIGHT & BRENNAN,
Attorneys for Plaintiff (Defendant in Error.)

Filed in Office May 9, 1927.

211 FILING ENTRIES.

Entries of filing of each of the portions of the record, in the District Court of the United States, Savannah Division.

Petition filed to the City Court of Savannah on the 19th day of October, 1925, together with process and return of service, November 3, 1925.

Petition for removal, removal bond, notice of intention to file said petition for removal, acknowlesigment of service thereon and order or removal, November 3, 1925.

Amendments to Petition filed October 15th, 1926, and order allowing same, October 15, 1926.

Amendment to Petition filed November 1st, 1926, and order allowing same, November 1, 1926.

Amendment to Petition filed February 23, 1927, and order allowing same, February 23, 1927.

Defendant's Answer, December 3, 1925.

Verdict of the Jury, February 24, 1927.

Judgment of the Court, February 25, 1927.

Bill of Exceptions filed by Defendant together with entry of opposing counsel approving same and Order of Court allowing and settling same, April 26, 1927.

Assignment of Error, April 26, 1927.

Petition for Writ of Error, the supersedeas bond and the order allowing writ of error and approving bond, April 26, 1927.

Writ of Error, with acknowledgment of service thereon, May 6, 1927.

Citation, with acknowledgment of service thereon, May 6, 1927.

Praecipe, with agreement of counsel for Defendant in Error, May 6, 1927.

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212 CLERK'S CERTIFICATE.

(Title Omitted.)

Seaboard Air Line Railway Company, Plaintiff in Error, and John W. Gleason, doing business as John W. Gleason Cotton Company, Defendant in Error.

United States of America—Southern District of Georgia, Fifth Judicial District.

In pursuance of the command of the Writ of Error within, I, SCOTT A. EDWARDS, Clerk of the District Court of the United States for the Southern District of Georgia, herewith transmit a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in this case of John W. Gleason, doing business as John W. Gleason Cotton Company vs. Seaboard Air Line Railway Company, lately pending in the District Court of the United States for the Southern District of Georgia, under my hand and seal of said Court.

Witness my official signature and the seal of said District Court at the City of Savannah, in said District, this 21st day of May, in the year of our Lord, One Thousand Nine Hundred and Twenty-seven.

SCOTT A. EDWARDS,
(Seal) Clerk of the District Court of the United States for the Southern District of Georgia.
By MARGARET CLARKE,
Chief Deputy Clerk.

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213 Writ of Error and Citation omitted from the printed record, the originals thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * * * *

Minute entry of argument and submission Oct. 4, 1927, omitted in printing.

In United States Circuit Court of Appeals, Fifth Circuit

No. 5103

Seaboard Air Line Railway Company, Plaintiff in Error,

Versus

John W. Gleason, Doing Business as John W. Gleason Cotton Company, Defendant in Error

Error to the District Court of the United States for the Southern District of Georgia

E. Ormonde Hunter and J. Randolph Anderson (Anderson, Cann & Cann, J. Randolph Anderson, Conneral & Hunter, E. Ormonde Hunter on the brief), for Plaintiff in Error.

Edward Brennan for Defendant in Error.

Before Walker, Bryan, and Foster, Circuit Judges

Opinion—Filed October 28, 1927

Walker, Circuit Judge:—

This was an action by the defendant in error, herein called the Cotton Company, against the plaintiff in error, Seaboard Air Line Railway Company, herein called the Railway Company, and resulted in a judgment for the former based on a verdict in its favor on the second and third counts of its petition. The evidence disclosed the following facts:

One McDonnell, an employee of the Railway Company in its office at Savannah, Georgia, conceived a plan of swindling the Cotton Company to his own enrichment by a forged bill of lading transaction. He procured a leave of absence from his employer for the 18th of March for the alleged purpose of taking a certified public accountant's

examination in Atlanta. On March 18th McDonnell went to Charleston, South Carolina, where he presented himself under the name of J. A. Tillman at the Bank of Charleston and drew on the Cotton Company in the name of said Tillman for Ten Thousand ($10,000.00) Dollars with a bill of lading attached purporting to cover One Hundred Ten (110) bales of cotton marked J. A. T. received March 18, 1925, at Charleston to be transported by the Railway Company to Savannah, order said Tillman, notify the Cotton Company. The bill of lading thus uttered by McDonnell, the endorsement on same and the draft drawn by him in the name of said Tillman were all forged by the said McDonnell. The name of J. A. Tillman used by him was a fictitious name. As a matter of fact there was no such shipment originating at Charleston. No such One Hundred Ten (110) bales or any part of same ever existed or was ever delivered to the Railway Company by said Tillman or said McDonnell or by anyone for transportation to Savannah to the order of said Tillman or to notify the Cotton Company.

McDonnell then returned to Savannah and was back at his desk on the 19th. The forged draft and bill of lading were forwarded for collection from Charleston through the Citizens & Southern Bank of Savannah with a letter to the effect that the said Tillman came to the Bank of Charleston unidentified. This letter with the draft and bill of lading attached, the Citizens & Southern Bank presented to the Cotton Company. In furtherance of his fraudulent scheme, upon being telephoned by the Cotton Company at his employer's office, McDonnell then stated to it that the cars designated in the forged bills of lading had arrived at the terminals in Savannah, although he knew this to be false. Thereupon the Cotton Company paid the draft. McDonnell's duties as an employee of the Railway Company in its Savannah office included giving notice to the trade of the arrival of cotton.

After the draft was paid in Savannah and the funds transmitted to the Bank of Charleston in Charleston by mail, arriving at the opening of business on the morning of March 20, 1925, said McDonnell, after having procured another leave of absence from the business of the Railway Company, allegedly in connection with his public account

ant's examination, presented himself at the said Bank of Charleston during the morning of that day, still masquerading under the name of Tillman, and collected the Ten Thousand ($10,000.00) Dollars with which he decamped. The officials of the Bank of Charleston who handled this transaction had received no information of any kind relative to the bill of lading from the Railway Company, its agents or employees in Charleston or elsewhere, but relied solely upon the representations of McDonnell, masquerading as Tillman, in receiving the same, forwarding it for collection and paying out the proceeds. Said McDonnell then had no connection of any kind with the Railway Company at Charleston. He had no authority to issue bills of lading at Charleston. The forged bill of lading was not issued by McDonnell in or about the offices of the Seaboard Air Line Railway Company in Charleston. The records of the offices of the Railway Company in and about Charleston contain no record of any kind of this purported shipment. The Charleston way bill references given by McDonnell were fictitious, the actual way bills bearing those names as of record in the Charleston office of the Railway Company covered entirely different shipments, none of which were shipped by Tillman or McDonnell, none of which were to the Cotton Company or notify the Cotton Company, and none of which covered cotton.

The second count was predicated on the above mentioned false and fraudulent statement made over the telephone by McDonnell to the Cotton Company to the effect that the cars designated in the forged bill of lading had arrived at the terminals in Savannah. The third count was predicated on allegations to the effect that prior to March 19th, 1925, the Railway Company knew that McDonnell was corrupt and dishonest and had stolen numerous bales of cotton from the Railway Company and had forged bills of lading, and that the Railway Company was negligent in continuing said McDonnell in its employment, notwithstanding such knowledge. The Railway Company duly excepted to the following, among other rulings of the Court: The overruling of separate motions that verdict in favor of the Railway Company on the second and third counts be directed, and the following part of the court's charge to the jury:

"In the one part of the case before you, that is Count Two, it will be necessary to prove—in fact some of it is not disputed—the different cotton transactions in Savannah—it will be necessary to prove that McDonnell was the agent, and that this statement of him, which is not denied, that the 110 bales of cotton were actually on hand at the Savannah Terminals in Savannah, and that he made that statement, and that was within the scope of his authority, and that the $10,080.00 was paid only after the assurance that the cotton had arrived and was there under this bill of lading and that after such assurance was given the $10,080.00 was actually paid. If you find that is true it will be your duty to find a verdict for the plaintiff."

In overruling a motion for a new trial the trial Judge stated: "It is the opinion of the court that the evidence is not sufficient to warrant the verdict upon the Third Count, and had the verdict been upon that count alone, a new trial would have been granted."

The undisputed evidence was to the effect that the acts of McDonnell with reference to the forged bill of lading were done to effectuate an independent fraudulent purpose of his own, in utter disregard of the object for which he was employed, not for the purpose of furthering his employer's business, and that in doing those acts he was acting for himself alone and not in behalf of his employer or the latter's business. Under the general rule prevailing in the Federal Courts an employer is not liable for such conduct of his employee. Friedlander v. Texas & Pac. Railway Co., 130 U. S. 416; Harris, Jr. & Vance, Wood Compress Co., 6 Fed. (2), 7; 20 Corpus Juris, 1295, et seq. The facts of the case do not bring it within the exception to the above-mentioned rule created by the Act of August 29, 1916, c. 422, 39 Stat. 542; Comp. Stat. 8604 [41] making a carrier liable to a holder for value of an order bill of lading issued by or on behalf of the carrier by an agent or employee whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the States and with foreign nations. No evidence indicated that McDonnell had either actual or apparent authority to issue bills of lading for the Railway Company at Charleston, where

the forged bill of lading purported to have been issued. In enacting the statute mentioned Congress impliedly approved the above mentioned rule, which had been stated in the opinion in the case of Friedlander vs. Texas, &c., Railway Co., supra, by legislating on the subject and creating an exception to that rule, instead of abolishing it. We think that the evidence adduced sustained the allegations of the third count. Above mentioned rulings of the court are not consistent with conclusions we have expressed. Because of the errors in those rulings the judgment is reversed, and the cause is remanded for a new trial.

Reversed.

In United States Circuit Court of Appeals

[Title omitted]

Judgment. Oct. 28, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for a new trial;

It is further ordered and adjudged that the defendant in error, John W. Gleason, doing business as John W. Gleason Cotton Company, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

In United States Circuit Court of Appeals

[Title omitted]

Petition for Rehearing. Filed November 10, 1927

Now comes the defendant in error and respectfully moves this Court for a rehearing of this cause upon the following grounds:

The opinion of this Court delivered in this cause on October 28th, 1927, holds that it is a general rule of the Federal Courts that an employer is not liable for the act of its employe within the scope of the employment if the act is to accomplish an independent scheme of the employe's and not to further the interest of the employer.

We have steadfastly contended in the lower Court and in this Court that this rule has been announced only once by a Federal Court (unless perhaps in the case of Harriss, Irby & Vose vs. Allied Compress Company.)

This one statement is found in the case of Friedlander vs. Texas, etc., Ry. Company, 130 U. S. 416; 32 Law Edition, 991.

We say this because after a diligent search we have not found another Federal case approving the rule.

Therefore, the Friedlander case should be carefully considered.

The facts of that case were that the plaintiff filed suit against the Railway Company to recover for the non-delivery of certain cotton named in an alleged bill of lading of which they claimed to be assignees for value, after counting upon the said bill of lading they pled that the Railway Company was estopped from setting up the non-receipt of the cotton.

Chief Justice Fuller delivered the opinion of the court, which held:

That an agent authorized to issue bills of lading has no authority to represent that the goods have been received; that his authority is limited to contracting for the transportation of the goods delivered to the carrier; that until the goods are received there can be no contract for transportation and delivery; that it is not within the scope of his employment to make representations that the goods were received; that one who relies upon representations so made does so at his peril.

In support of this the Court cites Grant vs. Norway and a long line of cases following it. The rule announced in those cases has been applied where a bill of lading was issued by an agent who was innocently mistaken. It has also been applied where the agent acted for what he thought

was the interest of his principal, and it is, of course, applicable where the agent acted in fraud of his principal and for his own benefit.

The rule in all of these cases, however, is simply that the agent is only authorized to contract for the transportation of goods actually received by the carrier, and that it is not within the scope of his employment to represent that the goods have been received.

A synopsis of the briefs filed by counsel in the Friedlander case is given in the Lawyers Edition. It there appears that the rule exempting the principal from liability when the agent acts for his own benefit was not argued.

The Chief Justice, however, having already decided the case proceeded obiter along another line, which was not covered by the pleadings, and which had not been argued by counsel, and stated that the carrier could not be held liable in an action for deceit upon the representation made in the bill of lading that the goods had been received. The pleadings did not attempt to recover upon an action for deceit, and, of course, if it was beyond the scope of the employment of the agent to make representations as to the receipt of goods as it had been previously established by a long line of decisions such representation would not bind the carrier whether it was made innocently or fraudulently. However, the learned Chief Justice decided to notice the theory being much discussed in England at that time, and proceeds to apply this theory which this Court in the present decision holds is a "general rule" of the Federal Courts, that the master is only liable "for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." In support of this rule the Chief Justice cites the case of Barwick vs. English Joint Stock Bank and the case of British Mutual Banking Company vs. Charnwood Forest R. Company. He also invites the reader's attention to Limpus vs. London General Omnibus Company.

As this statement of the rule now under discussion is not only dicta but gratuitous since the point was not argued it is well to consider all other cases mentioned by the Chief Justice.

Limpus vs. London General Omnibus Company (English Ruling Cases, Vol. 17, Page 258) which the Chief Justice does not contend supports his proposition, but which he simply invites to the attention of the reader, was a case in which the defendants' driver drove an omnibus against another omnibus belonging to the plaintiff. The trial Court charged the jury that the defendant was liable for the act of its servant, whether done recklessly or wantonly or carelessly, if it was done in the course of his service, and employment, and in doing it he believed it to be for the interest of the defendant. But "that if the true character of the act of the defendants' servant was that it was an act of his own, and in order to effect a purpose of his own, the defendant was not responsible."

The verdict was for the plaintiff. The plaintiff did not except to the charge. The defendants excepted claiming that the Court should have charged that if the driver acted wilfully the defendants were not liable.

The case is one of actual agency and holds the master responsible for the wilful act of his servant. The Court overruled the defendants' exceptions. Whatever is in the case about a master not being responsible for the servant's wilful act, if done to effectuate a purpose of his own, is merely dicta, and is in conflict with the decision of this Court in Texas etc. Ry. Company vs. Scoville, 62 Fed. 730.

The next is Barwick vs. English Joint Stock Bank decided in Exchequer Chamber, 1867. (12 English Ruling Cases 298.) That was a case in which it was alleged that in consideration of the plaintiff agreeing to sell to J. Dyers & Son certain oats for the use of J. D's contract with the Government, the defendants, through its agent, promised that they would honor the check of J. D in favor of the plaintiff in payment of the said goods on receipt of the money from the Government under the contract in priority to any other payment except to the defendants bank; the plaintiff, relying upon the defendants' promise, furnished the oats, J. D gave their check to the plaintiff, the defendant received from the Government money more than sufficient to pay the check but refused to do it, the defendants falsely and fraudulently represented to the plaintiff that J. D were not then and there indebted to them. It is also alleged that the defendants appro-

priated the money so received from the Government to the payment of a debt due the defendants by J. D. Upon the trial of the case the Court non-suited the plaintiff.

The Exchequer Chamber reversed the trial Judge and held "that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." In that case there was no question of the servant acting for his own benefit. We shall mention this case later.

The other case mentioned in support of the Chief Justice's dicta is British Mutual Banking Company vs. Charnwood Forest R. Company. We have not a report on this case in our hands at present. It is said by Lord MacNaughten, in Lloyd vs. Grace, that the decision was by Lord Bowen, and that the part of the opinion in reference to the question now under discussion could not "be supported either on principle or on authority." He further states that the opinions there expressed were not necessary for the decision. Mr. Vance, in the article quoted in our brief, states that the Court also there held that the action of the Secretary of the corporation in falsely issuing a spurious certificate of stock would not bind the corporation since the false representation would be ultra vires the corporation.

Lord MacNaughten's opinion shows that it was never considered that these two cases settled the law in England and that after these decisions had been rendered Judges, who had participated in the judgment of Barwick vs. the Bank, did not consider that they were precluded from holding the principal liable for the deceit of the agent committed for the agent's own benefit, provided the act was within the scope of the agent's employment.

The article cited in our brief from the Canadian Law Times gives an elaborate review of the history of the rule, and shows that these two decisions were never considered as having settled the law, and that Canada did not follow them.

The case of Lloyd vs. Grace is a decision by the House of Lords in 1912. (American Anno. Cases 1913 B. Page 819.) It is a unanimous decision. It completely reviews all prior decisions of the English Courts bearing upon the question and holds the master liable for the acts of his

servants although the acts be performed for the servant's benefit and is gross fraud, provided the act be within the scope of the employment. It considers this question as having been settled as early as Lord Holt's time in Hern vs. Nichols, and as having been approved by Mr. Justice Joseph Story. Of all the Law Lords only Lord MacNaughten thought the above mentioned decision of Lord Bowen worthy of notice, and he states that it could not be supported either on principle or on authority and that the opinion so expressed is not necessary for the decision. Of course, the other part of the opinion of Lord Bowen needs only to be stated to be refuted. His statement that wilful torts are ultravires the corporation although receiving approval at one time has been so long dead that we do not think it necessary to mention it further. To return to Lloyd vs. Grace it will be seen that not one of the Law Lords thought that they were overruling an established principle. Lord Shaw stated that in his opinion it never was meant to be announced as law that the principle was not liable in such a case, and that most if not all the cases cited in the argument "it will be found upon investigation that the transaction which was in question was in fact not merely for the agent's own benefit, but a piece of conduct beyond the scope of his employment."

No Federal Court has heretofore considered that dicta seriously.

The true Federal rule is set forth in Merchant's Bank vs. State Bank, 10 Wall. 604; 19 Law Edition 1060. It was there held that a corporation is liable for all the misrepresentations of its agent within the scope of the agent's employment. It is stated that the rule was settled as early as Lord Holt's time in Hern vs. Nichols, and the Supreme Court cites in support of the rule cases in which the agent was acting fraudulently and for his own benefit.

It has never been heretofore considered that this statement of the rule had been qualified by Chief Justice Fuller's dicta.

In the litigation brought by David Armstrong as Receiver of the Fidelity National Bank the Supreme Court of the United States and the Circuit Court of Appeals for the Sixth Circuit (speaking through the present Chief Justice while Circuit Judge) failed to apply the rule as announced by this Court in this case.

See Armstrong vs. American, Etc., 133 U. S. 433; 33 Law Edition 747.

Chemical National Bank vs. Armstrong, 28 L. R. A. 231 et seq. and 59 Federal 372; 65 Federal 573; 76 Federal 339; 83 Federal 556. (The attorneys in this litigation were permitted to file briefs in Auten vs. U. S. National Bank 174 U. S. 125; 43 Law Edition 920.)

In these cases the officers of the Bank had acted fraudulently and followed an independent scheme of their own, the Bank was held liable for misrepresentations made in letters signed by these officers. (These letters were called non-negotiable certificates of deposit.) And also for drafts signed by the officers. The fact that the money obtained by these frauds was placed to the credit of the Bank without its knowledge, and checked out without its knowledge by the same officers, was held to be immaterial in Western National Bank vs. Armstrong, 152 U. S. 346; 38 Law Edition 470.

The question which the Court recognized as the determining factor in all of these cases was whether the act was within the scope of the agent's employment.

The present Chief Justice is the only Judge who ever noticed the contention that if the act was in fraud of the Bank and for the agent's benefit the principal would not be liable. And he brushed this contention aside. It is only fair to notice, however, that Chief Justice Fuller was absent when Armstrong vs. American supra was decided.

As previously pointed out on pages 46 and 47 of our brief and on page 2 of our addition to our brief, the Sixth, Eighth and Ninth Circuit Courts of Appeal and the old Circuit Court of New York have repudiated this rule.

The House of Lords has denied that the rule ever existed.

Counsel for the plaintiff in error conceded in the oral argument before this Court that the overwhelming weight of authority among the State Courts had refused to adopt this rule.

The Supreme Court of the United States and the present Chief Justice have brushed this rule aside.

And we have not found a single Federal case where this rule was the ratio decidendi of the decision unless it be Harriss, Irby & Vose vs. Allied Compress Company.

Of course, this Court knows what it intended to decide in that case, but we were under the impression that that case

decided that the agent signing the warehouse receipt was only authorized to contract for the storage and delivery of goods actually delivered, and that it was not within the scope of his employment to make representations as to the receipt of goods. We were led to this belief because this Court cited in that case the Schooner Freeman vs. Buckingham, 18 How. 182, 15 Law Edition 341, in which the agent did not act fraudulently nor for his own benefit. This court also cited the case of Iron Mountain R. Co. vs. Knight, 122 U. S. 79, 30 Law Edition 1077, which was squarely decided upon the ground that the agent authorized to issue bills of lading was not authorized to make representations concerning the goods delivered for transportation. That case also quoted with approval Lord Esher's statement that he always considered the case of Grant vs. Norway to mean that the special limitations upon the authority of the master of a vessel were known among mercantile persons, and that they had no right to rely upon the representations made by the master. The question of the agent's fraud is not mentioned in the reason for the opinion.

In conclusion we respectfully request that this Court, in considering this motion, make use of the statement of facts contained in our brief which statement is conceded by the plaintiff in error to be correct and in our opinion is not more elaborate than necessary to present our case.

Respectfully submitted.

Walter C. Hartridge, Edward Brennan, Attorneys for Merant, the Defendant in Error, Hartridge & Brennan, of Counsel.

P. O. Address: Savannah, Ga.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—Dec. 5, 1927

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR AND ORDER STAYING MANDATE—Filed December 14, 1927

To the Honorable Judges of the United States Circuit Court of Appeals of the Fifth Circuit:

The petition of John W. Gleason, defendant in error, in the above styled cause, respectfully shows:

That on October 28th, 1927, this Honorable Court reversed the action of the trial court which was brought — this Court for review in the above styled cause, and on December 5th, 1927, denied your petitioner a rehearing.

That your petitioner intends to petition the Supreme Court of the United States to issue a writ of certiorari to require this Court to certify this cause to the Supreme Court of the United States for determination by it.

That your petitioner has instructed his attorney, Edward Brennan, a member of the Bar of the Supreme Court of the United States, to proceed as promptly as possible to prepare and present the necessary petition, brief and other documents necessary for that purpose.

Wherefore your petitioner prays that the mandate of this Court to be issued in said cause be stayed a reasonable time.

(Signed) Edward Brennan, Attorney for Defendant in Error.

It being made known that the defendant in error in the above numbered and entitled cause desires to apply to the Supreme Court of the United States for the issuance of the writ of certiorari in said cause, it is ordered that the mandate of this court in said cause be stayed for the period of 40 days; such mandate to issue upon the expiration of the period mentioned unless the proposed application for the writ of certiorari shall then have been submitted to the Supreme Court of the United States.

Done at New Orleans, Louisiana, this 14th day of December, 1927.

(Signed) R. W. Walker, United States Circuit Judge.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 5, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Certificate of Oakley F. Dodd, Clerk, U. S. C. C. A., Fifth Circuit, to foregoing transcript omitted in printing.

Endorsed on cover: File No. 33,167. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 51. John W. Gleason, doing business as John W. Gleason Cotton Company, petitioner, vs. Seaboard Air Line Railway Company. Petition for writ of certiorari and exhibit thereto. Filed January 23rd, 1928. File No. 33,167.

FILED
JAN 23 '28
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

JOHN W. GLEASON, DOING BUSINESS AS JOHN W. GLEASON COTTON COMPANY, Petitioner,

vs.

SEABOARD AIR LINE RAILWAY COMPANY, Respondent.

No. 515

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND SUPPORTING BRIEF.

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All references to the official record in this cause are abbreviated "R. ——." The numeral following the "R" refers to the page of the official record.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

JOHN W. GLEASON, DOING BUSINESS AS JOHN W. GLEASON COTTON COMPANY, Petitioner,

vs.

SEABOARD AIR LINE RAILWAY COMPANY, Respondent.

Your petitioner, John W Gleason, respectfully shows:

I

Your petitioner trading as the John W Gleason Cotton Company brought an action in the City Court of Savannah against the respondent, Seaboard Air Line Railway Company, who duly removed the cause to the United States District Court for the Southern District of Georgia because of diversity of citizenship. (R. 1 and 13.)

II

That the second count of your petitioner's pleadings and evidence showed:

Respondent is a common carrier with terminals at Savannah, Georgia, and employed at these terminals one McDonell

as its agent to give notice to the cotton trade of the arrival of cotton under order notify bills of lading. (R. 36, 43, 46, 123.) That on March 19th, 1925, the said McDonell acting within the scope of his employment and authority, and as agent for the respondent, notified your petitioner in the customary manner that a certain lot of cotton had arrived in Savannah under a designated order notify bill of lading requiring notice of arrival to be given your petitioner. (R. 36, 37, 38, 41, 45, 132.) That thereafter on the same date a local bank presented to your petitioner the designated bill of lading properly endorsed and attached to a draft drawn on your petitioner for Ten Thousand ($10,000) Dollars. (R. 45, 69, 70, 71.)

That relying upon the representation made by the respondent through its agent as above set forth your petitioner paid the draft and became the owner of the said bill of lading. (R. 64, 70.)

That the said bill of lading was a forgery; no such cotton was in existence nor arrived in Savannah. (R. 29, par. 7.)

The respondent proved: That McDonell on March 17th procured a leave of absence from the respondent. He proceeded to Charleston, S. C., where in furtherance of a fraudulent scheme, and without the real or apparent scope of his employment, he issued the forged bill of lading to the order of a fictitious person and under the name of that person drew on the Gleason Cotton Company, depositing the draft and bill of lading in a Charleston Bank to be forwarded for collection. The next day he returned to his duties at the respondent's Savannah office and there gave the false information to petitioner. The draft was paid as stated. McDonell then procured another leave of absence, returned to Charleston and obtained from the bank there the Ten Thousand ($10,000) Dollars which had been sent from Savannah.

The respondent then moved for a directed verdict stating "Now the Court quite properly over-ruled our demurrer to the Second Count, and the Court in over-ruling our demurrer said it was not apparent without inferring that disposition by McDonell to perfect some fraudulent independent scheme of his own, it is not apparent who issued it. But now that is undisputably stated. (R. 175.)

The trial Judge over-ruled the motion and charged that before your petitioner could recover on the Second Count the jury must find that the statement by McDonell that the cotton was actually on hand at Savannah was within the scope of his authority and that your petitioner parted with his Ten Thousand ($10,000) Dollars only after such assurance was given. (R. 189.)

The jury returned a verdict for your petitioner upon the Second Count. (R. 33.)

III

The United States Circuit Court of Appeals for the Fifth Circuit reversed the trial Court on October 28th, 1927, and denied a motion for a rehearing on December 5th, 1927. The case was there numbered 5103. The Circuit Court of Appeals held (21 Fed. (2) 883; R. 214) that the verdict upon the Second Count could not stand because:

It is "the general rule prevailing in the Federal Courts" that an employer is not liable for the fraudulent act of its employe *committed within the scope of his employment and authority* if that act is done to effectuate an independent fraudulent purpose of his own and not for the purpose of furthering his employer's business.

Your petitioner now complains of that ruling and judgment.

IV

The first reason which we urge for a review of that judgment of the fifth Circuit Court of Appeals is:

That there is not a single decision of any Federal Court (except perhaps one prior decision of the Fifth Circuit Court of Appeals) where this rule is the *ratio decidendi* of the decision.

That while the rule was apparently approved once by this Court citing with approval two English banking cases, which were believed to be authority for the rule, this was done by Chief Justice Fuller in the case of Friedlander vs. The Texas etc. Ry. Company, 130 U. S. 416 (1889) *when the rule was not covered by the pleadings nor argued in the briefs filed in the cause.*

That case was decided in accord with a long line of authorities from both this country and England. But Chief Justice Fuller, after deciding the case, did not stop. We most earnestly invite this Honorable Court's attention to our review of that case which will be found in our brief.

The House of Lords in Lloyd vs. Grace, (1912) App. Cas. 716; Am. Anno. Cases 1913 B 819, expressly and by name over-ruled those cases which had been cited by Chief Justice Fuller and stated that the parts of them which announced the so called rule could not be supported on either principle or authority and were not necessary for the decisions. That the law had been settled to the contrary as early as Lord Holt's time and approved by Mr. Justice Joseph Story.

V

The second reason which we urge for a review of the judgment of the Circuit Court of Appeals for the Fifth Circuit is that it ignores the true Federal rule, which was announced

by this Honorable Court in the case of Merchants Bank *vs.* State Bank, 10 Wall, 604. It is there held that a principal is liable for all of the misrepresentations of an agent within the scope of his authority and that "Those who create the trust, appoint the trustee and clothe him with the powers that enabled him to mislead—ought to suffer rather than the other party." And that the employer who holds out the employe as worthy of confidence should be the loser. It is said that Lord Holt approved the rule.

And this Court cited with approval cases in which the agent had acted fraudulently and for his own benefit. Mr. Justice Clifford who dissented had called attention on circuit (Federal case No. 9449) that Farmers and Mch. Bank *vs.* Butchers and Drovers Bank was not in point because there the servant followed an independent fraudulent scheme not for his master's benefit. But the majority of this Honorable Court cited with praise and approvel a long extract from that decision to the effect that in such a case the employer is liable, for he it is who selects the servant, holds him out as worthy of confidence and forces the public to deal with him.

In Armstrong *vs.* American Exchange Bank, 133 U. S. 433, officers of a bank had within the scope of their authority made false and fraudulent statements in letters (called non-negotiable certificates of deposit). These were in pursuance of an independent fraudulent scheme and not for the benefit of their employer. The employer was held liable.

VI

The third reason which we urge for a review of the decision in this cause is that the question involved is one of general law and great importance.

The employer is liable under the State law. Planters Rice Mill Company *vs.* Merchants National Bank, 78 Georgia 574.

The House of Lords in Lloyd *vs.* Grace *supra* considered the question of great importance and allowed the appeal in *forma pauperis*.

The Earl of Halsbury there said, "I should be very sorry to see a principle which appears to me of so great value shaken by any authority. No treatise on agency that I have ever come across has thrown any doubt on it—."

Lord MacNaughten there stated that it would be "absolutely shocking" not to hold the principal liable.

Lord Shaw said he did not think that it was ever distinctly meant to be said that in such a case the principal was not liable and that in practically all of not all of the cases holding otherwise the agent's fraud was not only for his own benefit *but a piece of conduct beyond the scope of his employment*.

The Canadian Law Times (1914), Volume 34, page 205, in a learned review of the rule holding the employer liable said, "Without it the affairs of every day life could not be carried on" and that it had been "finally settled on business-like principles."

We believe that our brief shows that the over-whelming weight of authority holds the employer liable.

Immediately upon the organization of the American Law Institute it commenced to prepare a restatement of the law of Agency. It recognized the subject as one of the most important with which it had to deal. It selected an eminent authority, Mr. Floyd Mechem, to prepare the preliminary draft. Mr. Mechem's views were well known. He had stated that in such a case as this the principal is liable. Paragraph 1990 of Mechem on Agency.

We submit that for this Honorable Court to permit the present decision in this case to stand unreviewed will not only severely handicap the American Law Institute in its attempt at a restatement of this branch of the law, but will also throw this important subject into the utmost confusion.

VII

As the fourth reason why the decision in this cause should be reviewed we submit that there is at present a conflict between the United States Circuit Court of Appeals for the Fifth Circuit and the United States Circuit Courts of Appeals for the Sixth, Eighth and Ninth Circuits.

In the Ninth Circuit a learned, able and full opinion in Bank of Palo Alto *vs.* Pacific Postal Tel. & Cable Company, 103 Fed. 841, had held an employer liable in such a case. The Circuit Court of Appeals affirmed the case, 109 Fed. 369 (1901). We quote from the first headnote of the decision of the Court of Appeals:

"A telegraph company is liable to a bank for the loss occasioned to the latter by its payment of money, without negligence, on a message purporting to have been sent by another bank, but which was in fact concocted and forged by an operator employed by the telegraph company——. In such case the act of the operator in sending the false message, although criminal and unauthorized by the company, was within the apparent scope of his employment, and if the message had been genuine would have been within his actual authority, and it was only by reason of such authority that he was enable to consummate the fraud."

We submit that the following decisions adopt the same rule in their respective Circuits:

Smith vs. First National Bank,
268 Fed. 780 (8th Circuit Court of Appeals 1920).
Certiorari denied, 254 U. S. 655-656.

National City Bank vs. Carter,
14 Fed. (2) 940 (Circuit Court of Appeals 6th Cir. 1926).

Wherefore your petitioner prays that a writ of certiorari may be issued by this Court and directed to the United States Circuit Court of Appeals for the Fifth Circuit to bring the cause and judgment now complained of to this Honorable Court for a review and determination.

EDWARD BRENNAN,
Counsel for John W. Gleason doing business as John W. Gleason Cotton Company, petitioner.

P. O. ADDRESS:
SAVANNAH, GEORGIA

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

JOHN W. GLEASON, DOING BUSINESS AS JOHN W. GLEASON COTTON COMPANY, Petitioner,

vs.

SEABOARD AIR LINE RAILWAY COMPANY, Respondent.

No.____

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The petition for the writ of certiorari confines itself to the second count of our original complaint, which will be found on page 4 of the record.

The only question decided by the Circuit Court of Appeals for the Fifth Circuit or raised by the respondent's assignments of error (R. 196) relating to the second count is that the trial court erred in failing to recognize that:

"It is a general rule prevailing in the Federal Courts" that an employer is not liable for the false and fraudulent misrepresentations made by its employe *within the scope of his employment and authority* if the misrepresentation is

made to effectuate an independent fraudulent purpose of his own and is not for the purpose of furthering his employer's business.

We earnestly invite this Honorable Court's attention to the views of the trial Judge expressed on page 184 of the record and to the charge of the Court which begins on page 186 of the record. It will be seen from an examination of these that the misrepresentation was made by the agent of the respondent within the scope of his employment and authority.

It is our contention that in such a case:

1. The overwhelming weight of authority holds the employer liable.

2. The true Federal rule holds the employer liable.

II

THE WEIGHT OF AUTHORITY

In Hern vs. Nichols (*Nisi Prius* 1708, 1 Salk. 289) appears the following:

"And Holt, C. J., was of opinion that the merchant was answerable for the deceit of his factor, though not criminaliter, yet civiliter; for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger. And upon this opinion the plaintiff had a verdict."

We quote from Grammar vs. Nixon. *Nisi Prius*, Eyre, C. J., 1725 (1 Str. 653):

"A goldsmith's apprentice sold an ingot of gold and silver upon a special warranty that it was of the same value per ounce with an essay then shown. Upon the evidence it

appeared he had forged the essay and that the ingot was made out of a lodger's plate, which he had stolen. And the Chief Justice held the master was answerable in this case."

It will be noted that the reasoning of Chief Justice Holt, if accepted, is applicable to all deceits of the employe committed within the scope of his employment. The decision of Chief Justice Eyre shows that no distinction was drawn in 1725 between those deceits committed for the benefit of the master and the deceits committed for the benefit of the servant.

In Lloyd *vs.* Grace, House of Lords, July 19th, 1912 (1912 A. C. 716; Am. Ann. Cases 1913 B, 819) a case in which an agent had committed a fraud for his own benefit, the House of Lords was of the unanimous opinion that the principal was liable. They considered the law as having been settled in Hearn *vs.* Nichols *supra* and approved by Mr. Justice Joseph Story. An elaborate review of the rule exempting the principal from liability when the agent acts for his own benefit and not for the benefit of the principal is contained in this case. The cases of Barwick *vs.* Bank and British Mutual Banking Company *vs.* Charnwood Forest R. Co., were fully discussed. Chief Justice Fuller had cited these two cases in the Friedlander case. The House of Lords stated that these two English cases could not be supported on principle or authority and that statements in them that the master was not responsible for such frauds of his agent were not necessary for the opinion. We shall not attempt an elaborate review of this decision of the House of Lords. We earnestly invite it to the Court's attention. We simply wish to call to this Court's attention that the rule announced by the Fifth Circuit Court of Appeals was not the law at the time of our separation from England and that it did not creep into the law of England until after the middle of the last century. The decision of the House of Lords shows that the rule recognized by those two decisions was never the settled law of England and that Judges, who had participated in Barwick *vs.* Bank, did not

consider that they were thereafter precluded from holding the principal liable in such a case.

Another review of the rule will be found in Volume 34 Canadian Law Times 205 (1914). It appears from this article that Canada had never recognized that the master was not responsible in such a case.

In 1881 Mr. Justice Oliver Wendell Holmes, Jr., in "The Common Law" page 231 referred to the attempt to exempt the master from liability as being local to England and in foot note 3, page 231, he meets the objections to holding the master liable by stating that they are the same objections attaching to the peculiar consequences of the relation of master and servant in general.

In 1906 William R. Vance in Michigan Law Review, Volume 4, page 209, referring to the dicta of British Mutual Banking Company vs. Charnwood Forest R. Company relieving the master from liability said: "This view seems unduly narrow, and inconsistent with many other cases to be found in the English Reports. It is certainly contrary to the great weight of authority in this country, it being well settled here that: 'The rule which fastens a liability upon the master to third persons for the wrongful and unauthorized acts of his servant is not confined solely to that class of cases where the acts complained of are done in the course of the employment in furtherance of the master's business or interest, though there are many cases which fall within the rule.'"

And Mr. Mechem in Section 1990 of his Treatise on Agency states:

"The English Courts had seemed to hold that the principal would not be liable in such a case, but that view has been now definitely discarded. The American cases have generally held the principal liable to innocent third persons where the representation was made in the course of the principal's business

and apparently for his account and while the agent was acting within the general scope of his authority, even though in the particular case he was secretly abusing his authority and attempting to perpetrate a fraud upon his principal or some other person for his own ultimate benefit."

In Tome vs. Parkersburg Railroad Company, 39 Maryland 36; 17 American Reports, Page 540, the Maryland Courts held the principal liable for the fraud of the agent committed for his own benefit, stating:

"The American doctrine on this subject is announced by Story, in terms equally emphatic and comprehensive, viz:

'It is a general doctrine of law, that although the principal is not ordinarily liable (for he sometimes is), in a criminal suit, for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in those acts or misdeeds; yet, he is liable to third persons in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed, know of such misconduct or even if he forbade the acts or disapproved of them. In all such cases the rule applies respondeat superior; and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him, through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby in effect he warrants his fidelity and good conduct in all matters within the scope of the agency.' Story on Agency (7 Ed.) Ch. 17, Section 452; Penn. Del. & Md. Steam Nav. Co. vs. Hungerford, 6 G. & J. 291; Lord Holt's opinion in Lane vs. Cotton, 12 Mod. 490; Paley on Agency by Lloyd, 294, 301, 307; Bac. Abr. Master and Servant R. These principles apply as well to private corporations as to natural persons."

In 2 Corpus Juris on pages 849 and 850 appears the following:

"Acts of fraud by the agent committed in the course or scope of his employment are also binding on the principal even though the principal did not in fact know or authorize the commissions of the fraudulent acts and although he derive no benefit from the success of the fraud."

Three very good statements of this view of the law will be found in Planter's Rice Mill Company vs. Merchants National Bank, 78 Ga. 574; Bank of Palo Alto vs. Pacific Postal Tel. Cable Company, 103 Fed. 841, and Griswold vs. Haven, 25 N. Y. 595, 82 A. Dec. 380.

The following are a few of the decisions holding that the employer is liable:

Cleaney vs. Parker
167 Ala. 134, 140 Am. St. R. 21

Dregman vs. Morgan County National Bank
62 Col. 277, 162 Pac. 321 (6).

Bridgeport Bank vs. New York & N. H. R. Co.
30 Conn. 231.

First National Bank vs. Peck
180 Ind. 649, 103 N. E. 643.

Barnes vs. Century Savings Bank
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Allen vs. South Boston R. Co.
150 Mass. 200, 5 L. R. A. 716.

Engen vs. Merchants & Manufacturers State Bank
164 Minn. 293, 204 N. W. 963.

Berkovitz vs. Morton-Gregson
112 Neb. 154, 198 N. W. 868, 33 A. L. R. 85.

Fifth Avenue Bank *vs.* Railway Company
137 N. Y. 231, 33 Am. St. R. 712.

Havens *vs.* Bank of Tarboro
132 N. C. 214, 95 Am. St. R. 627.

Cincinnati *vs.* City National Bank
56 Ohio St. 351, 43 L. R. A. 777.

City National Bank *vs.* Martin
20 Texas 643, 8 Am. St. R. 632.

Appeal of Kisterbrock
127 Pa. 601, 14 Am. St. R. 868.

III

We desire to call attention to the fact that neither the general rule holding the master liable nor the so called exception to it, originated in cases dealing with misstatements in negotiable instruments and that cases holding the master responsible for such misstatements notwithstanding the fact that they were made for the agent's benefit were not in the majority of instances, dealing with negotiable instruments.

But we submit there can be no sound distinction between those two classes of cases. See:

Griswold *vs.* Haven, 25 N. Y. 595, 82 A. Dec. 380.

Statement of Samuel Williston on page 26 of Senate Document, 650 Sixty-second Congress Second Session, quoted elsewhere in our brief.

Particularly is this true in a case like the present when the misrepresentation was made directly to us. See:

Farmers & Merchants Bank *vs.* Butchers & Drovers Bank
16 N. Y. 125, 69 Am. Dec. 678.

IV

We also wish at this time to call to this Honorable Court's attention that the rule holding the principal liable for the fraud of the agent committed for the agent's benefit did not originate in cases dealing with officers of corporations, and is not peculiar to that branch of the law.

This Court in announcing the rule in Merchants Bank vs. State Bank, 10 Wall. 604, prefaced the announcement with the statement that it was the same law applicable to individual principals.

The English decisions relieving the principal from liability dealt with executive officers of corporations.

We submit that there can be no sound reason for twisting this about and saying that the principal is liable for the fraud of his agent committed for the agent's benefit when the agent is an executive officer of a corporation, but that the principal is not liable when the agent is not an executive officer of a corporation.

V

The true Federal rule will be found in Paragraphs V and VII of our petition for the writ of certiorari in this cause. We shall not encumber this brief by repeating what is there said. We only wish to call this Honorable Court's attention to the fact that what was said in Merchants Bank vs. State Bank, 10 Wall. 604, in regard to the principal's liability for representations of the agent was not stated in regard to negotiable instruments. This Court expressly declared that it was dealing with "the subject of the authority of the cashier of the State Bank to make the purchase, and (was) excluding

from consideration—the certified checks." It will also be noted that Mr. Justice Clifford who dissented urged the extension of the Freeman, 18 How. 187, where the doctrine of "conditional authority" was applied. The majority of the Court ignored this.

We reiterate that we have not found a single Federal decision (unless perhaps one prior decision of the Fifth Circuit) where the rule applied by the Fifth Circuit Court of Appeals in this case was the basis of the decision

VI

The facts of the Friedlander case were that the plaintiff filed suit against the Railway Company to recover for the non-delivery of certain cotton named in an alleged bill of lading of which they claimed to be assignees for value, after counting upon the said bill of lading they plead that the Railway Company was estopped from setting up the non-receipt of the cotton.

Chief Justice Fuller delivered the opinion of the Court, which held:

That an agent whose duty it is to issue bills of lading has no authority to issue a bill of lading until the goods therein described have been received; that his authority is limited to contracting for the transportation of goods actually delivered to the carrier; that until the goods have been so delivered he is without authority in the premises, and that a representation in such a case that the goods had been received was beyond the scope of his authority.

In support of this the Court cites a long line of cases applying the rule of "conditional authority," "the rule being that if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain

contingency or the performance of a certain condition the occurrence of the event, or the happening of the contingency or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively or merely by mistake." National Bank of Commerce vs. Chicago, Burlington & Northern R. Co., 44 Minn. 224, 9 L. R. A. 263.

Now if it were not within the scope of the employment of the agent to make representation as to the receipt of goods such representations would not bind the carrier whether made innocently or fraudlently. Mechem on Agency, Sec. 1988.

It will be noted that the pleadings in the Friedlander case did not attempt to recover upon an action for deceit and the briefs, filed by the attorneys arguing the case show, that the rule exempting the principal from liability when the agent acts for his own benefit was not argued.

However, the Chief Justice having rightly decided the case according to precedents and the pleadings, did not stop but decided to notice the theory being much discussed in England at that time and proceeded to apply that theory which the Fifth Circuit Court of Appeals holds is the general rule of the Federal Courts, that the master is only liable "for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." In support of this rule the Chief Justice cites the case of Barwick vs. English Joint Stock Bank and the case of British Mutual Banking Company vs. Charnwood Forest R. Company. He also invites the reader's attention to Limpus vs. London General Omnibus Company.

As this statement of the rule is not only dicta but gratuitous since the point was not argued it is well to consider all of the cases mentioned by Chief Justice Fuller.

Barwick *vs.* English Joint Stock Bank was decided in the Exchequer Chamber 1867 (12 English Ruling Cases 298, L. R. 2 Ex. 259-267) and was a case in which it was alleged that in consideration of the plaintiff agreeing to sell J. D. certain oats for the use of J. D.'s contract with the Government, the defendants through its Manager promised that they would honor the check of J. D. in favor of the plaintiff in payment of the said goods on receipt of the money from the Government under the contract in priority to any other payment except to the defendant bank; that the defendant's Manager falsely and fraudulently represented to the plaintiff that J. D. was not then and there indebted to it, the plaintiff relying upon the defendant's promise furnished the oats; J. D. gave their check to the plaintiff; the defendant received from the Government money more than sufficient to pay the check but refused to do it and appropriated the money so received to the payment of a debt due the defendant by J. D. Upon the trial of the case the Court non-suited the plaintiff.

The Exchequer Chamber reversed the trial court and held "that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." In that case there was no question of the officer of the bank acting for his own benefit. The case is fully reviewed in Lloyd *vs.* Grace *supra* where Lord MacNaughten's opinion there rendered shows that Judges, who participated in the judgment of Barwick *vs.* The Bank, did not consider they were precluded from holding the principal liable for the deceit of the agent committed for the agent's own benefit, provided the act was within the scope of the agent's employment.

The next case cited by Chief Justice Fuller is British Mutual Banking Company *vs.* Charnwood Forest R. Company decided by the Court of Appeals 1878 (18 Q. B. D. 714). In that case an attempt was made to hold the corporation liable for the fraudulent issue of certificates of stock in excess of the amount which the Company was authorized by

law to issue. The action was in deceit for the false statement of the secretary of the corporation made in regard to the stock but for his own benefit. The decision is by Lord Bowen who stated that the Company could not be held liable in contract for any such contract would have been beyond their corporate powers; that if the action could be maintainable at all it must be upon the ground of deceit. "But how can a Company be made liable for a fraudulent answer given by their officers for his own private ends by which they could not have been bound if they had actually authorized him to make it, and promised to be bound by it? The question resolves itself accordingly into a dilemma. The fraudulent answer must have either been within the scope of the agent's employment or outside it. It could not be within it, for the Company had no power to bind themselves to the consequences of any such answer." Lord Bowen also mentions with approval the dicta in Barwick vs. The Bank to the effect that the fraud of the servant must be for the master's benefit before the master is bound. Lord Esher concurred in the result, but stated he based his decision upon the ground that the deceit was not for the benefit of the corporation. Lord MacNaughten in Lloyd vs. Grace stated that the decision of Lord Bowen in reference to the question under discussion could not be supported upon principle or authority, and that the opinion so expressed was not necessary for the decision. Lord Shaw concurred in this statement of Lord MacNaughten, and added "that I cannot bring myself to think that it was ever distinctly meant to be announced or suggested as law that, on the assumption that a person deals with an agent in good faith, and that the conduct of the agent is fully within the scope of his authority, then the principal of that agent is not responsible for the agent's fraud, by reason of the fact that the agent did not mean to benefit his principal by the fraud, but to benefit himself. That, in my opinion, is not the law. On the contrary the principal is, in such circumstances, legally responsible for his agent's conduct.

"I incline to the view that in most, if not all, of the cases cited in argument, it will be found upon investigation that the transaction which was in question was in fact not merely for the agent's own benefit, but a piece of conduct beyond the scope of his employment."

The next case mentioned by Chief Justice Fuller is Limpus vs. London General Omnibus Company (English Ruling cases, Vol. 17, page 258, 32 L. J. Ex. 34) which Chief Justice Fuller did not contend supported his proposition, but which he simply invited to the attention of the reader. This was a case in which the defendant's driver drove an omnibus against another omnibus belonging to the plaintiff. The trial court charged that the defendant was liable for the act of its servant whether done recklessly, carelessly or wantonly, if it was done in the course of his service and in doing it he believed it to be for the interest of the defendant. But "that if the true character of the act of the defendant's servant was that it was an act of his own, and in order to effect a purpose of his own, the defendant was not responsible."

The verdict was for the plaintiff. The plaintiff did not except to the charge. The defendant excepted claiming that the Court should have charged that if the driver acted wilfully the defendant was not liable. The defendant's exceptions were over-ruled.

The case is one of actual agency. The Circuit Court of Appeals for the Fifth Circuit in this cause gave a reference to Corpus Juris dealing with cases of actual agency. We wish to call to this Honorable Court's attention that while the question of actual agency is important in ordinary actions based upon trespass, etc., it is unimportant in actions for deceit. Mechem on Agency, Section 1989. This Court has recognized the great distinction between these two classes of cases when an attempt was made to have this Court apply the doctrines applicable to actions for deceit to the facts of a case which fell clearly within the rule of actual agency.

Chief Justice Taft stated: "Here it is not a question of contract or of holding out an appearance of authority on which some third person acts. It is a mere question of actual agency —." In our case it is not a question of actual agency, but it is "a question • • • of holding out an appearance of authority on which some third person acts." United Mine Workers of America vs. Coronado Coal Co., 259 U. S. 344; 66 L. Ed. 975, on page 395 of the official report and 989 of the Law Edition.

VII

The dicta of Mr. Chief Justice Fuller has not become the settled law of the Federal Courts.

We have recently found the case of Dun vs. City National Bank (Second Circuit decided October 17th, 1893), 58 Fed. 174. We have not seen another Federal case approving that view of the law unless it be one prior decision of the Fifth Circuit Court of Appeals.

The facts in the Second Circuit case were that a bank had subscribed to Dun's Mercantile Agency; the agency agreeing to obtain and furnish the bank with credit information. The contract stipulated that the information would be obtained by Dun through servants, attorneys, etc., who would be sub-agents, and that Dun was not to be responsible for the neglect of these sub-agents or in anywise to guarantee the correctness of the information. The bank requested certain information. One of the servants referred to in the contract transmitted to Dun's office false information for the servant's benefit. Dun's office gave the information to the bank which acted upon it to its damage.

The Second Circuit Court of Appeals held that the contract did not contemplate that Dun would be liable in such a case. *The construction of the contract was the basis of the decision.*

The Court cited with apparent approval Chief Justice Fuller's dicta. But the Court was careful to state: "The briefs and arguments of counsel on the appeal were largely devoted to a discussion of the liability of an innocent principal for the frauds and deceit of his agent, causing damage to a third party. That the decisions are not altogether harmonious must be conceded."

The trial Court had completely ignored Chief Justice Fuller's dicta in a very learned and well considered opinion delivered in 1892. The decision is reported in 51 Federal 160. We earnestly invite it to the Court's attention.

In the present case the Fifth Circuit Court of Appeals cited with approval the case of Harriss, Irby & Vose *vs.* Allied Compress Company, 6 Fed. (2) 7. That was a case in which it was attempted to hold a warehouse company for a false warehouse receipt issued by its agent without the receipt of the goods therein described. The false receipt had been issued for the benefit of the agent. The Circuit Court of Appeals for the Fifth Circuit did not discuss the dicta of Mr. Chief Justice Fuller and only stated that it would apply the Federal rule instead of the State rule, and that under the Federal rule the warehouse company was not liable and cited four decisions from this Court. In three of these decisions the theory relieving the principal from liability when the fraud is for the agent's benefit was not mentioned. The basis of all the decisions cited was the doctrine of "conditional authority." We submit that that doctrine, unless limited, is applicable to warehouse receipts.

Unless that decision has the effect of approving Chief Justice Fuller's dicta there is not a single Federal case which we have been able to find making that dicta the basis of a decision.

VIII

The Circuit Court of Appeals stated that Congress in passing the Uniform Bills of Lading Act impliedly approved the rule which had been stated in the Friedlander case by legislating upon the subject and creating an exception to the rule instead of abrogating it.

But we submit that the adoption of a uniform act by a Legislature should not imbed into the law of that jurisdiction all of the vagaries of reason stated as dicta to sustain a judgment when that judgment has finally been condemned as destroying uniformity and injuring commerce.

The uniform Acts are not drawn for only one jurisdiction, and this Honorable Court has declared that a Uniform Act "should not be regarded merely as an off shoot of local law." Commercial National Bank *vs.* Canal Louisiana Bank & Trust Company, 239 U. S. 520.

When we consider a Uniform Act "former local views" must be forgotten. See:

Vett *vs.* Giles, 281 Fed. 928.

Union Trust Company *vs.* McGinty, 212 Mass. 205; Anno Cases 1913 C. 525.

But we believe that statement of the Circuit Court of Appeals is inaccurate. Congress was informed that the Bill of Lading Act had been drawn by Samuel Williston (Congressional Record, Vol. 48, Part 11, Sixty-second Congress, Second Session on Page 11,437). Mr. Williston's statement to the Senate Committee (quoted on page 28 of our brief) shows that he considered that the carrier's exemption from liability in the particular case discussed was an exception to

the general rule, and that by abrogating the exception the law would be uniform "that the man who hires an agent to do a certain job must be answerable for the consequences of that agent's acts in that job whether he does it well or ill."

IX

Since the doctrine of "conditional authority" is not involved in this case we have not discussed it in this brief. In order that this Honorable Court may examine that doctrine if it sees fit we have attached to our brief a memorandum covering that subject.

Respectfully submitted,

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APPENDIX

THE DOCTRINE OF CONDITIONAL AUTHORITY

This rule, its meaning, nature and extent has been much misunderstood, discussed, defended and abused. We shall attempt to confine ourselves to matters which are not disputed since in the present case the able and astute counsel for the respondent conceded that the Court properly over-ruled his demurrer to our petition which showed that no cotton was on hand in Savannah at the time McDonell represented to us that the cotton had arrived at Savannah. In fact the respondent has never complained nor assigned error upon the over-ruling of the demurrer. Neither the demurrer nor the ruling thereon was taken to the Circuit Court of Appeals to be reviewed. And since the only question raised by the respondent's assignments of error was the failure of the trial Court to recognize the so called rule relieving the principal from liability for the fraud of the agent when acting for his own benefit, and since that was the only question of law decided by the Circuit Court of Appeals we shall not attempt to be exhaustive in our review of the doctrine of conditional authority.

Mr. Mechem discusses this doctrine in paragraphs 756 *et seq.*, of his treatise on Agency.

The author calls attention that the most important limitation upon this rule is the one which deals with "conditions necessarily and peculiarly within the knowledge of the agent."

He insists that this limitation should be given effect in warehouse receipts and bills of lading cases, where it is well known that the authority to issue warehouse receipts and bills of lading is conditional upon the receipt of goods by the agent but where the knowledge of whether or not the goods were so received is necessarily and peculiarly within the knowledge

of the agent. Mr. Mechem further points out that this Court, the English Courts and a majority of the American State Courts had refused to give effect to this limitation in bills of lading cases.

However, when the doctrine of conditional authority is to be given full effect it is, of course, immaterial whether the agent acted innocently but was mistaken as to the existence of the condition or whether the agent knew the condition did not exist but acted for what he considered was the best interest of his principal, or whether the agent knowing the condition did not exist acted fraudulently and for his own benefit.

The one and only thing important to determine in all such cases is whether or not the condition existed upon which the agent's authority depended. National Bank of Commerce *vs.* Chicago, Burlington & Northern R. Co., *supra*.

It is possible that the decisions of this Court dealing with bills of lading issued without the receipt of the goods therein described may have the effect of denying that the doctrine of conditional authority is limited where the condition is necessarily and peculiarly within the knowledge of the agent. William R. Vance assumes that such is the case in his brilliant attack upon the decision of this Court in the Freidlander case, and his equally vigorous attack upon the attempted limitation of the rule. Mr. Vance takes the position that the act of issuing a bill of lading amounts to a representation that the goods were received by the carrier and that this representation should be governed by the law applicable to the non-contractual representation of servants, which branch of the law does not recognize the truth as a condition necessary for the authority to make a statement and concerns itself only with the question as to whether or not the representation was within the scope of the servant's employment. (4 Mich. Law Review 199.)

Other authorities have taken the view that the decisions of this Court have not denied the existence of this limitation upon the doctrine of conditional authority but that they have simply held that bills of lading were to be treated in a class to themselves like bills of exchange accepted per procuration as held by Chief Justice Jervis in Grant vs. Norway, 10 C. B. 665, the first of this line of decisions.

This is apparently the view of Mr. Samuel Williston who says:

"The law laid down by the Supreme Court of the United States, following an early English case, is that under these circumstances a carrier can say that the agent who issued that bill had no authority to issue a bill of lading unless he had received the goods. I venture to say, in spite of the authority of the Supreme Court of the United States, that it seems to me that that was a mistaken view. I should not venture to say that if there were not the authority of many State Courts in support of the contrary opinion; if it were not true that on the Continent of Europe, where the same sort of question occurs, the law is uniform that the carrier is liable. But the Supreme Court of the United States, and a majority of the States which have decided the question, do hold the carrier harmless, and we seek to hold the carrier liable. *We say that there is no more reason why a carrier should not be responsible for the act of his agent in this particular than why any man should not be responsible for the act of his agent in the course of his business*, and especially is this true because of the way these bills are generally issued." (Senate Document No. 650 Sixty-second Congress, Second Session, page 12 and 13.) The italics are ours.

Mr. Williston further stated on page 26 of the same Document:

"Of course if a bank cashier wrongly certifies a check, although his authority may be said to be only to certify

checks where there is money enough in the bank, the bank pays the bill. If it is urged that a check is a negotiable paper and that the rule ought to be peculiar to negotiable paper, I should say the same rule is applicable to a certificate of stock; that if the officers whose business is to issue certificates of stock issues one which they have no business to issue, under the circumstances, because they have not taken up genuine certificates to represent it, the Company has got to pay the bill. And the fundamental principle back of it all, it seems to me, is this, that the man who hires an agent to do a certain job must be answerable for the consequences of that agent's acts in that job, whether he does it well or ill."

And this latter view seems to be borne out by the fact that this Court in Iron Mountain *vs.* Knight (122 U. S. 79) quoted with approval Lord Esher's statement that he always considered the case of Grant *vs.* Norway to mean that the special limitations upon the authority of the master of a vessel were known among mercantile persons and that they had no right to rely upon representatitions made by the master.

We shall not pursue the subject further than to call attention to the fact that the authority of an employe to give information in regard to a particular class of matters cannot be conditioned upon the information being true (Mechem on Agency, Par. 1786 and 1987) any more than the authority of an employe to do a particular class of acts can be conditioned upon him doing them properly and without negligence or fraud. (Vance in Mich. Law Review, Vol. 4, page 199.) Otherwise, of course, an employer could never be held liable for the false or fraudulent acts of his employe unless he expressly authorized or ratified them.

The failure to understand the doctrine of conditional authority has caused some confusion in an excellent work.

We quote from Fletcher's Cyclopedia of the law of Private Corporations beginning on page 5230:

"But an officer or agent of a corporation may take advantage of his position to perpetrate a fraud upon third persons, acting, not for the corporation, but for his own benefit, and in violation of his duty to the corporation. In such a case he certainly does not act in the course of his employment, but he may act in the apparent course of his employment, and thus deceive the other party. The question then arises whether the corporation or the innocent third person should suffer, both in fact being innocent, and, in answering this question, the courts have differed. Some of the courts hold that where an officer or agent of a corporation perpetrates a fraud upon an innocent third person, but for his own benefit, and not for the benefit of the corporation, the corporation, being without fault in the matter, is not liable, although the officer or agent may have acted in the apparent course of his employment. (4) The weight of authority, however, in this country at least, is to the contrary, and to the effect that a corporation is liable to innocent third persons, by estoppel, for the fraud and deceit of its officers and agents, acting in the apparent course of their employment, although it did not authorize or know of the fraud or deceit, and although it may have been committed by the officer or agent for his own benefit, and with intent to defraud the corporation. *This doctrine is that, 'where the principal has clothed his agent with power to do and act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice.'*

In accordance with this doctrine, it has been held that a corporation is liable to innocent third persons for the act of its agent, having general authority to issue certificates of

stock, for fraudulent issuing certificates for his own benefit; that a railroad or warehouse company is liable for the fraudulent act of its agent, having general authority to issue bills of lading or warehouse receipts upon the receipt of goods, in issuing a bill of lading or warehouse receipt without receiving goods, although he may act for his own benefit, though a contrary view is held in some decisions; (9) that a bank is liable for the fraud of its cashier in drawing checks in favor of customers of the bank, without their knowledge, and without intending them to have any interest therein, and then forging their indorsements and delivering the checks to third persons, to be collected for his own benefit; and that a telegraph company is liable for the act of its operator in sending a forged telegram requesting the transmission of money, although he acts for his own benefit."

We have placed in italics that part of the work which we believe causes confusion. The author states that it is the reason for holding a corporation liable for the deceit of its agent.

We submit that this is inaccurate; that it is the reason for the existence of the limitation upon the rule of conditional authority; that it is the reason why a principal will be held liable for the act of an agent when the agent is not authorized to act unless certain conditions exist, but the existance of those conditions is peculiarly within the knowledge of the agent.

The reason given relates to the question of the agent's authority and it is immaterial whether the agent acted fraudulently or honestly. Arnold *vs.* National Bank of Waupaca, Wis., 105 N. W. 828, 3 L. R. A. (N. S.) 580.

The fourth footnote to the article is as follows:

"Friedlander *vs.* Texas & P. R. Co., 130 U. S., 416, 32 L. Ed. 991; British Mut. Banking Co. *vs.* Charnwood Forest Ry.

Co., 18 Q. B. Div. 714, and other cases specifically referred to in the notes following."

As pointed out in our brief that part of the Friedlander decision which supports the text is dicta not covered by the pleadings nor arguments, and the British Mutual Banking Company case was expressly over-ruled by the House of Lords.

The only "other cases specifically referred to in the notes" are in footnote nine on page 5232.

In this ninth footnote is cited the Friedlander case and Pollard *vs.* Vinton, 105 U. S. 7, two English cases and one case from each of the States of Maryland, Minnesota and North Carolina.

Now Pollard *vs.* Vinton, 105 U. S. 7, was squarely decided upon the question of authority. The effect of an agent's deceit was not discussed. In fact it was apparently treated as immaterial for the Court stated:

"But if we can suppose there was testimony from which the jury might have inferred either mistake or bad faith on the part of Cobb and Co. (the agents) we are of opinion that Vinton, the shipowner, is not liable for the false statement in the bill of lading, because the transaction was not within the scope of their authority."

The first English case cited is Grant *vs.* Norway, 10 C. B. 665. Neither the pleadings nor the opinion of the Court disclosed fraud or negligence by the agent. The case holds that from the generally known usage of the trade a bill of lading may be liken to a bill of exchange accepted per procuration.

The next English case is Cox *vs.* Bruce, 18 Q. B., D. 147. Not one word is said in that case about the agent's fraud. Lopes L. J. who concurred in the judgment said that there was

an attempt to hold the principal liable for the negligence of the ship master. Lord Esher delivered the opinion. We have mentioned it elsewhere in our brief.

Not one of the three American cases cited decides that the principal is not liable because of the fraud of the agent. They hold the principal not liable notwithstanding the fraud of the agent.

Each one of the States mentioned in this footnote holds the principal liable for the fraud of the Agent committed for the agent's benefit when the act is within the scope of the agent's authority. See pages 14 and 15 of our brief. And the same is now true of England.

All of the cases in this footnote deal with the doctrine of conditional authority as applied to bills of lading.

We submit that the only authority cited sustaining the statement of the text that some courts hold the principal is not liable when the agent acts for his own benefit is the overruled English case and Mr. Chief Justice Fuller's dicta citing that case delivered at a time when the question was not covered by the pleadings nor argued by the counsel.

Of course we agree with the statement in the text that the weight of authority holds the principal liable.

Respectfully submitted,

EDWARD BRENNAN,
Attorney for Petitioner.

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

JOHN W. GLEASON, DOING BUSINESS AS JOHN W. GLEASON COTTON COMPANY, Petitioner,

vs.

SEABOARD AIR LINE RAILWAY COMPANY, Respondent.

No. 715 51

MOTION FOR PERMISSION TO MAKE REPLY AND REPLY TO RESPONDENT'S ANSWER FOR A WRIT OF CERTIORARI

EDWARD BRENNAN,
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IN THE

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OCTOBER TERM, 1927

JOHN W. GLEASON, DOING BUSINESS AS JOHN W. GLEASON COTTON COMPANY, Petitioner,

vs.

SEABOARD AIR LINE RAILWAY COMPANY, Respondent.

No. 715

REPLY TO ANSWER OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

Now comes the petitioner and respectfully moves this Court for permission to make the following reply to the respondent's answer:

On page 6 of the answer it is stated that Part II of the Railroad's brief in the case of Friedlander vs. Texas, etc. 130 U. S. 416, was devoted entirely to a discussion of the rule now adopted by the Fifth Circuit Court of Appeals. The original brief is of file in the office of the Clerk. We earnestly request that it be examined, bearing in mind that the doctrine of "conditional authority" and the rule contended for by

the respondent are entirely distinct and unrelated. We believe that this Court will agree with us that the argument made went to the question of the agent's authority. It is certain that not one of the cases cited by Mr. Chief Justice Fuller to sustain his dicta was mentioned much less discussed.

On page 7 of the answer is cited an extract from Harriss, Irby and Vose vs. Allied Compress Company, 6 Fed. (2) 7. This case is fully reviewed in our brief. We there charge that three of the decisions cited by the Circuit Court of Appeals did not involve the rule now adopted by that Court. The respondent does not deny this. An examination of those cases will show that it is true.

On page 8 of the answer the opinion in Armstrong vs. American Exchange Bank, 133 U. S. 433, is discussed. This opinion dealt with two cases, one numbered 1110 and the other numbered 1111. Case No. 1110 dealt with a draft. Case No. 1111 dealt with a letter called a non-negotiable certificate of deposit. In our petition we called attention to that part of the decision dealing with the non-negotiable certificate of deposit, which was, therefore, case No. 1111. The respondent in its attempt to distinguish that case has seen fit to quote from case No. 1110, matters which are in no wise applicable to case No. 1111.

On page 9 of the answer is quoted one sentence from Mr. Mechem. The sentence immediately following the one quoted must be read in connection therewith to understand the meaning of the author. It will be noted from a reading of the complete text and particularly from a reading of foot note 27 that the author does not contend that the view taken by the Circuit Court of Appeals in this cause was the law anywhere when his work was published.

On page 10 of the answer it is said that Mr. Mechem "then" discusses fraudulent bills of lading. This is an error. The respondent should have said that Mr. Mechem *had* more than two hundred pages previously discussed fraudulent bills of lading when dealing with the doctrine of "condiitonal authority," which doctrine does not concern itself with the motive of the agent, and that the authorities cited in the foot note deal with that doctrine.

At the bottom of page 10 of the answer appears a citation from Labatt dealing entirely with the doctrine of "conditional authority."

It will be noted that the respondent with great labor attempts to show that some authorities recognize that there exist somewhere the rule now contended for by it, but that it has not cited a single case other than the cases of Friedlander vs. Texas etc., and Harriss, Irby and Vose vs. Allied Compress Company.

On page 11 of the answer it is said that Bank of Palo Alto vs. Pacific etc. 103 Fed. 841, was decided under the local law of California, and that the case "does not mention or pretend to discuss the Federal Rule." We submit that this is a mistake. The first head note states that the principal "is liable both under the general principles of law and under Civil Code of California * * ." The Court cites cases from New York, Minnesota, California, South Carolina, Nevada, and from this Honorable Court and several other Federal Courts, and from these reaches its conclusions.

The Circuit Court of Appeals in the same case 109 Fed 369, decided the case entirely on the question of general law

On pages 12 and 13 of the answer it is said that the cases of Smith vs. First National Bank, 268 Fed. 780; 254

U. S. 655 and National City Bank vs. Carter, 14 Fed. (2) 940, were decided on questions of local law. Not a single State statute nor a single State decision is cited in those opinions. There is nothing in those cases which warrants such a criticism. Both cases dealt with the authority of agents of National Banks, and the liability of a National Bank for the fraud of its agent, which is certainly a question of general law.

Respectfully submitted,

EDWARD BRENNAN,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 51

JOHN W. GLEASON, doing business as JOHN W. GLEASON COTTON COMPANY, *Petitioner*,

vs.

SEABOARD AIR LINE RAILWAY COMPANY, *Respondent*.

BRIEF FOR PETITIONER.

WALTER C. HARRIDGE,
EDWARD BRENNAN,
Attorneys for Petitioner.

(33,167)

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